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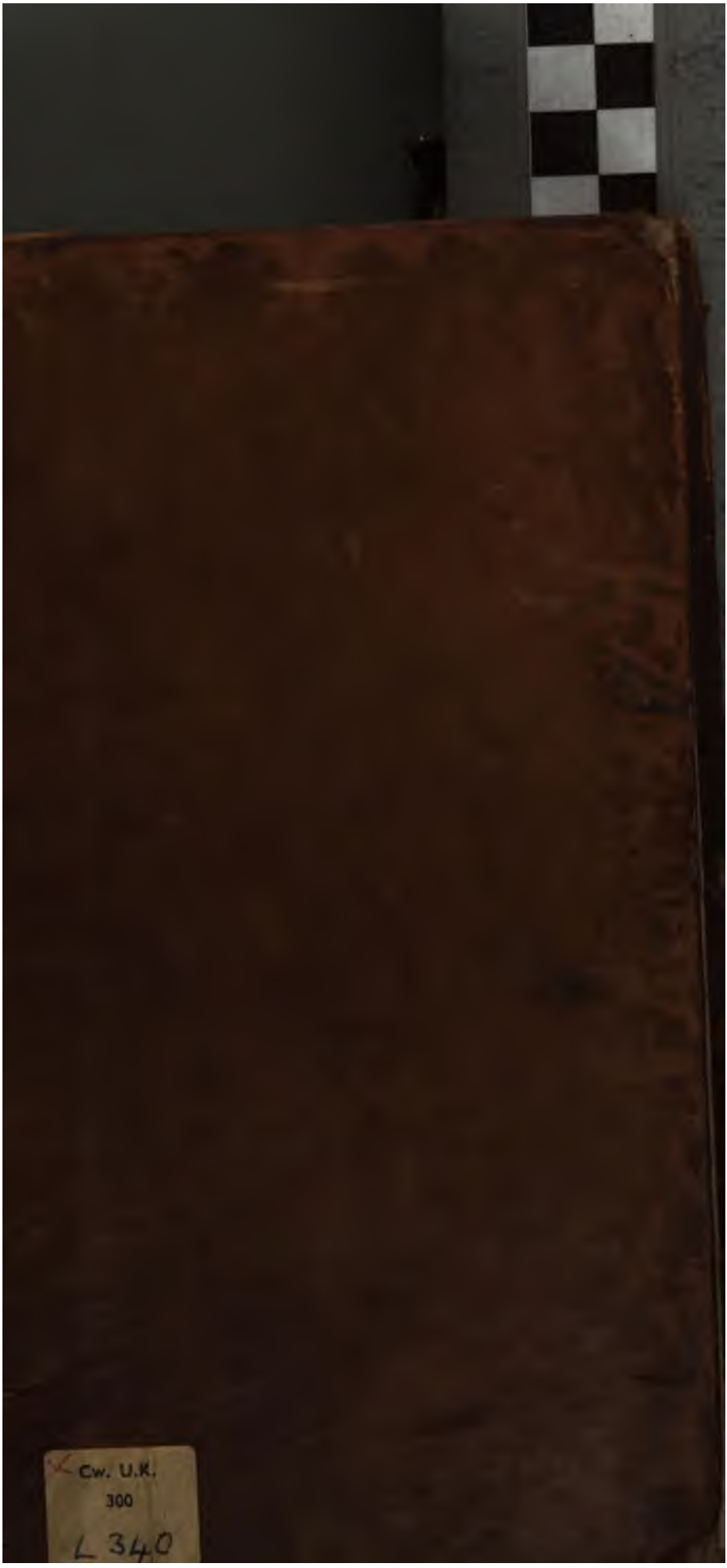
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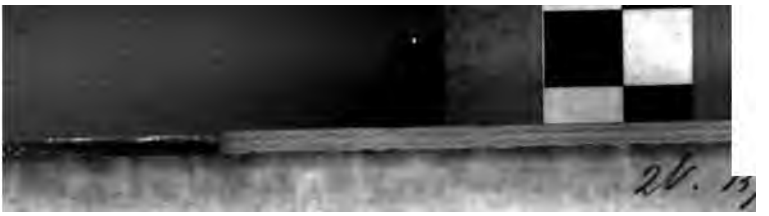

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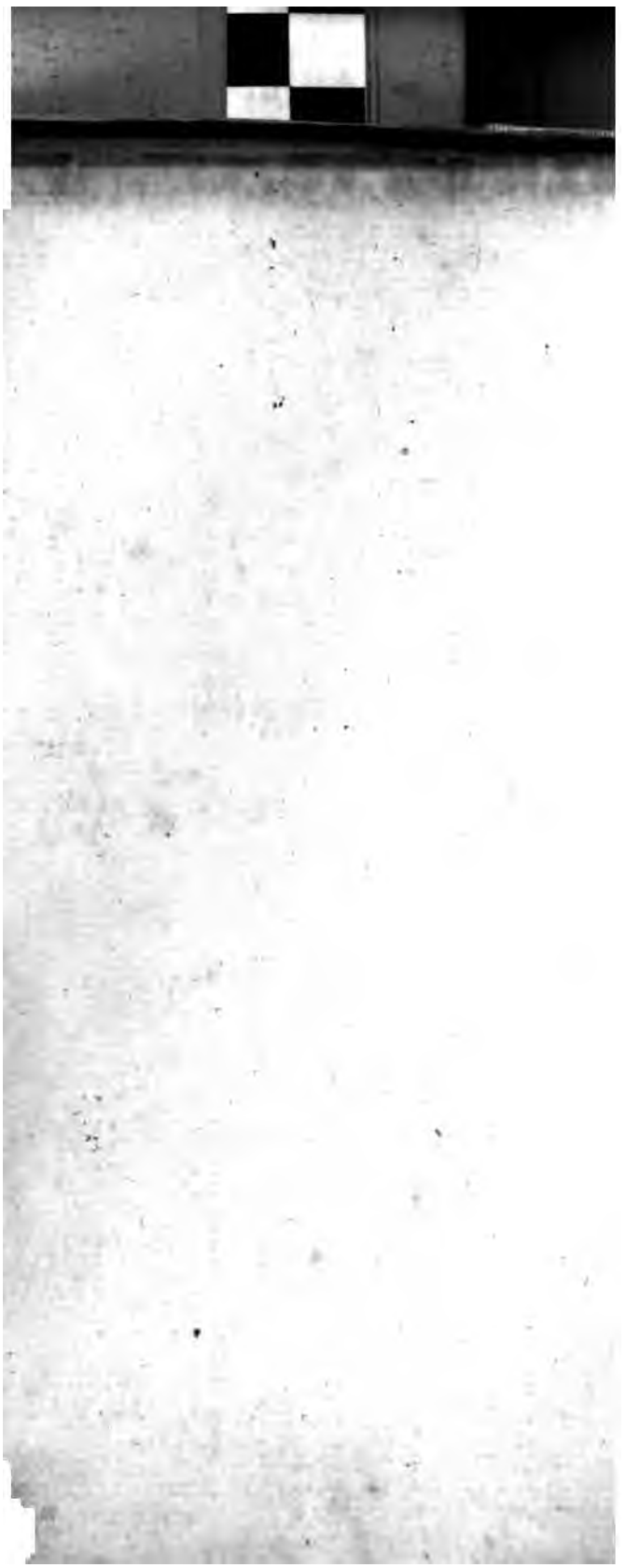


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THE

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An Account of every important Proceeding in the

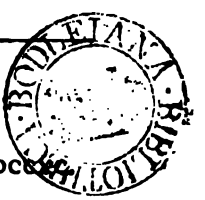
COURTS AT WESTMINSTER,

DURING THE PRESENT YEAR.

WITH THE DECISIONS OF THE

JUDGES,

IN THEIR OWN WORDS.



VOL. I.

FOR THE YEAR MDCC[illegible]

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PLAN OF THE WORK.

TO give an immediate, full, and accurate account of every important Deciſion in the ſeveral Courts at Weſtminſter is the primary object of this Publication; the utility of which to every one who practiſes the law, and ſtill more to thoſe who adminiſter it, is too obvious to be enlarged upon. To the Student alſo it will be found a ſource of neceſſary knowledge, and to the Private Gentleman a fund of uſeful information.

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A Publication of this kind ſeems peculiarly proper at this time, when the newſpapers are daily giving undigeſted and erroneous accounts of Law Caſes, which cannot fail to perplex and miſlead the Practitioner and the Student; and to betray the people, as circumſtances may ariſe in their own concerns, into miſtaken hopes and fears from the Juſtice of the Country.

It remains only to add, that this Work will be continued Monthly, and no pains or diligence ſhall be wanting to render it acceptable to the Profeſſion, inſtructive to the Student, and uſeful to that moſt honourable and beneficial of all public characters, the COUNTRY MAGISTRATE.



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THE

LAWYER'S

AND

MAGISTRATE'S MAGAZINE.

For FEBRUARY, 1790.

Adjudged Caſes in the Courts at Weſtminſter in laſt Michaelmas Term.

REX, *v.* HURDIS.

THIS was an appeal againſt a poor-rate; which rate was confirmed by the ſeſſions, ſubject to the following

CASE.

THE appellant objected to the rate, becauſe one Iſaac Wood, gunner of his majeſty's fort and battery at Seaford, who was a ſervant to his majeſty, and not in his own right the occupier of the dwelling-houſe thereto belonging, and who therefore ought not to have been charged in the rate, was inſerted therein, and charged as the occupier of the battery-houſe. Wood was taxed for the battery-houſe ten ſhillings. At the time of making the rate, he was, and ſtill is, a head or maſter-gunner, and acted as ſuch in the fort or battery of Seaford. The fort and battery-houſe are the property of the crown. A maſter-gunner is a warrant-officer, appointed and removeable at pleaſure by the maſter-general of the ordnance; though his office is uſually conſidered as a proviſion for life. Wood, being ſo employed in the fort, *occupied the whole of the houſe*, except one room, which is allotted to the under-gunner by direction from the ordnance; and the furniture of this houſe belonged to Wood. The inhabitants of the town, port, or pariſh, paying to the poor-rate thereof, have a right to vote in the election of



members of parliament for the town and port; and the appellant is an inhabitant of that deſcription.

LORD KENYON, C. J.—I ſhall determine on the ground of poſitive law, as laid down in 43. *Eliz.* which ſubjects every occupier of lands, houſes, &c. to be rated to the poor. Now, it is expreſsly ſtated, that *Wood was the occupier of the battery-houſe*; and though it might perhaps have been contended below that he was not the occupier in the legal ſenſe of the word, yet the finding of the ſeſſions precludes that queſtion here. It is not however a general poſition, that a ſervant of the crown, occupying a houſe in reſpect of his office, is not rateable for it; for I was always rated for the houſe which I had as Maſter of the Rolls; and ſo are the auditors and tellers of the exchequer. Soldiers indeed cannot be ſaid to be the *occupiers* of their barracks; they are no more than mere ſervants.

ASHHURST, J.—Wherever perſons are ſtated by the ſeſſions to be the *occupiers* of crown-lands or houſes, they muſt be rated; though ſuch property would not be rateable in the hands of the king himſelf. In the ſame manner, though hoſpitals, or lands held for their immediate ſupport, are not rateable, yet if any officer hold part of the hoſpital lands for his own convenience, then he becomes rateable; as, in the caſe of *Eyre and Smallpace* (2 Burr. 1059), the comptroller of Chelſea College, reſiding in the comptroller's apartments, was held rateable as occupier. Now, Wood was occupier in this caſe; and though he had not a life-intereſt, yet it is well known that ſuch perſons are never diſmiſſed, unleſs for miſbehaviour; and if he were conſidered as a mere tenant at will, that will not vary the caſe. Order confirmed.

REX, *v.* JUSTICES OF HEREFORDSHIRE.

An order of removal was made on the 18th of *April*, and the pauper was removed on the 19th to a place twenty miles diſtant from Hereford, where the quarter-ſeſſions were held on the 22d *following*.—The pariſh not having appealed at this ſeſſions, the juſtices refuſed to receive the appeal at the Midſummer ſeſſions, they not being the *next* quarter ſeſſions after the order.

This was an application for a *mandamus* to the juſtices to receive the appeal.

LORD KENYON, C. J.—The words of the act 13 and 14 Car. II. cap. 12. § 2. expreſsly require the appeal to be made at the next ſeſſions after the grievance. Where indeed an order has been made ſome time before, and only execut-



ed a very ſhort time before the ſeſſions, ſo that there was no poſſibility of appealing to thoſe ſeſſions, this court has granted a *mandamus* to receive the appeal afterwards, becauſe the "next ſeſſions" muſt mean the next *poſſible* ſeſſions. But here were two intervening days after the delivery of the pauper before the Eaſter ſeſſions. And if there was not time to give reaſonable notice of appeal, the appeal might have been entered and adjourned according to 9 Geo. cap. 7, § 8.

The other judges concurred.

Rule diſcharged.

REX, v. ST. MATTHEW, IPSWICH.

Edm. Stollery and wife were removed from St. Nicholas to St. Matthew, in Ipſwich. Order confirmed by ſeſſions, ſubject to the following

CASE.

About five years ago, the waiter belonging to S. Ribbands, who kept an inn in St. Matthew, being ill, ſent for the pauper, Edmund Stollery (who was then a ſingle man, and legally ſettled in St. Nicholas) to aſſiſt him at the inn, where he ſtayed as *helper to the waiter* about ſix months, and then went away. The waiter, being again taken ill, ſent for the pauper *to help him*, which he did; and he continued in the inn as boot-catcher for nineteen months, during which time he lodged and boarded there, and was to be ſatisfied by the gentlemen who came to the houſe. Ribbands knew of his being there the night after he came, but nothing paſſed between him and the pauper at the time. The waiter who ſent for the pauper continued in the ſervice of Ribbands till about July in the next year, when he went away, and the pauper continued there till the Chriſtmas following; when, Ribbands and the pauper having ſome diſpute, the former told him to go away; upon which he aſked Ribbands to give him ſomething for the time he had been there. Ribbands replied he ſhou'd not give him any thing, as he had made no agreement with him; but, on being preſſed again to conſider his ſituation, he not having any thing to help himſelf, Ribbands gave him two guineas, and ſent him away; and the pauper then left the houſe. The pauper conſidered himſelf not as a ſervant to Ribbands, but as aſſiſtant to the waiter, and thought himſelf at liberty to go away when



he pleaſed: he ſaw Ribbands ſometimes, who, if a gueſt wanted his boots, told the pauper to get them, and at other times ſent him on errands.

In ſupport of the order, it was contended that the hiring and ſervice with Ribbands was good; for the waiter acted as the maſter's agent, as appears from Ribbands's ſeeing him the ſecond day. There was no agreement for *wages*; but, as the maſter accepted the ſervice of the pauper, he might have demanded recompence. And as he continued in the ſervice ſix months after the waiter was gone, without any new agreement, a general hiring may be preſumed.

LORD KENYON, ſtopping the other ſide, ſaid, a hiring was never preſumed by retroſpect; a *conditional* hiring was held good in the *New-Windſor* caſe (Burrowes's Settl. Caſe 19), but then there was from the firſt an expreſs hiring by the maſter. Hiring by the maſter *himſelf* is not neceſſary, nor are wages; and if there be an hiring, unleſs the contrary appears, a year will be preſumed.—But the argument here is, that he was Ribbands's ſervant, which is contradicted by the Caſe itſelf; for the *waiter* engaged him as *his helper*. But the Caſe muſt turn upon his ſecond coming—he came again to *help the waiter*; and there is nothing to infer that he was Ribbands's ſervant. For the laſt ſix months, a contract with Ribbands may be implied; and if he had been before in Ribbands's ſervice, and then lived under a yearly hiring, the ſettlement would have been gained. Where the nature of the caſe implies an hiring, the court will preſume it; but here the manner in which the pauper came excludes an hiring by the maſter.

Rule abſolute.

REX, *v.* THE INHABITANTS OF ST. AGNES.

Two occupiers of rateable property in the pariſh of St. Agnes, Cornwall, appeal againſt the poor-rate, becauſe certain perſons entitled to *farms of tin* and *toll tin* are omitted to be rated. Seſſions quaſh the rate, ſubject to the following

CASE.

J. P. Andrews, as truſtee of J. Enys, is entitled to a certain dish, or meaſure, ariſing out of certain lands and tin bounds in St. Agnes, called *toll and farm tin*; which toll is one 15th part of all the tin gotten in the lands of J. Enys, within the pariſh of St. Agnes; and which ſaid *farm tin or due*, is one 12th part, after the ſaid 15th part is deducted,

for

for toll of all ſuch tin ſo gotten within the tin bounds in the pariſh; and which ſaid dues or duties are due and payable by the laws and cuſtoms of the Stannaries of Cornwall, free and clear of all riſk and deduction whatſoever: but they are uncertain, and vary every year; yet for many years laſt paſt have produced a conſiderable ſum annually. And N. Donnithorne is entitled to a certain diſh, or meaſure, called *toll tin, or dues*, ariſing out of certain lands in St. Agnes, and due and payable in the manner before ſtated; and which toll varies, and is uncertain, but alſo produces a conſiderable ſum annually.

It was objected that Andrews and Donnithorne ſhould have been made parties to this Caſe. But the Court ſaid they would not be concluded by the determination, but might appeal themſelves, whenever they were taxed for this property.

LORD KENYON, C. J.—ſaid, he approved of the caſes of Rowls *v.* Gells, and R. *v.* Maddern (the former of which had been cited at the bar, as concluding the queſtion of want of notice, and the latter as deciding the rateability of this property); though theſe two perſons would not be precluded from objecting to their being charged in any future rate on any ground they might think proper. But they were not parties to this caſe, and could not make any objection to the order of ſeſſions.

Order of ſeſſions, quaſhing the rate, confirmed.

REX, *v.* THE INHABITANTS OF SCAMMOIN.

C. Bottomley and wife were removed from Scammoden to Soyland. The ſeſſions quaſhed the order, ſubject to the following

CASE.

The pauper being ſettled in Soyland, in the Weſt Riding of Yorkſhire, agreed with J. Harriſon for the purchaſe of an eſtate in Riſhworth for 28 l. and the conſideration in the deeds, and in the receipt indorſed, was 28 l. but the appellants produced parole-evidence, to prove that, before the deeds were executed, the vendor declared that, as the agreement was not in writing, he was not bound by it; and, having ſince had 30 l. offered for the eſtate, he would not take leſs; nor would he execute the deeds, unleſs the purchaſe-money were made up that ſum. Upon which the pauper advanced 1 l. 15 s. more, which, with 5s. owing from Harriſon to the pauper, made up the ſum of 30 l. but the



the deeds were not altered, and the conſideration therein mentioned was left according to the original agreement, *viz.* 28l. The counſel for the appellants contended this was a *bonâ-fide* purchaſe for 30l. But the ſeſſions were of opinion, that no parole-evidence could be given to contradict the conſideration mentioned in the deeds. The eſtate purchaſed was the eſtate of Harriſon's wife; and in the deed there was a covenant from Harriſon, that he and his wife would levy a fine unto C. Bottomley, in fee, of the premiſes, at the coſt of Bottomley; towards the expence of which fine C. Bottomley left in the hands of his attorney four guineas. The pauper reſided above three months upon the premiſes, and afterwards ſold them to his brother J. Bottomley. To this conveyance Harriſon and his wife were parties; and it recited Harriſon's covenant in the former deed to levy a fine; but, as ſuch a fine had not then been levied, it was agreed that, inſtead thereof Harriſon and his wife ſhould acknowledge and levy a fine of the premiſes upon Bottomley in fee, which fine was, in Hilary term, 1787, levied accordingly; part of the expence of levying it was diſcharged by the four guineas, ſo left in the hands of the attorney by the pauper; and the other part was paid by Bottomley. And the court of ſeſſions, being of opinion that the ſum of four guineas was to be conſidered as part of the conſideration under the act of parliament, and that C. Bottomley, by ſuch purchaſe, gained a ſettlement in Riſhworth, diſcharged the order.

Chambre, againſt the order, ſaid the parole-evidence was properly rejected by the ſeſſions. A *contract* in writing, much more a *deed*, cannot be contradicted by parole evidence; and, in Clarkſon *v.* Hannay (2 P. Wms. 203), parole-evidence was denied to prove other conſiderations than thoſe mentioned in the deed.

LORD KENYON, C. J.—Conſiderations not expreſſed in the deed may be proved. It is ſo in all caſes of covenants to ſtand ſeized to uſes. And, in the caſe of Filmer *v.* Gott (Brown's Parl. Caſes, 70), the deed was ſet aſide, becauſe, upon an iſſue out of Chancery, the jury found *natural love and affection, mentioned in the deed*, made *no part* of the conſideration. Order of ſeſſions affirmed.

REX, *v.* THE INHABITANTS OF FOLKSTONE.

CASE.

On the 10th of October, 1781, James King, the pauper, *hired a houſe in* the pariſh of Folkſtone of the yearly value of

of 5l. 5s. of Henry Selden, in which he reſided for three years; during which time he paid the land-tax for the houſe: but, after he had paid three quarterly rates in 1782, he complained to his landlord, that his (the land lord's) other tenants did not pay the land-tax for their houſes, and therefore deſired him to deduct it. The land lord refuſed to allow what the pauper had already paid, but agreed to deduct it in future, which he did. There was not any agreement made between the pauper and his land lord which of them ſhould pay the land-tax. The rate for the land-tax was in the following form:

Sum Aſſeſſed.	Proprietors Names.	Occupiers Names.	Premiſſes.	Quarterly payment.
£10 10 0	Henry Selden.	James King.	Houſe.	£0 2 6

The ſeſſions were of opinion that the *landlords were the perſons intended to be rated in the rate*; and that the names of occupiers, inſerted in the ſecond column, were only meant to diſtinguiſh the premiſſes, and to direct the collectors to whom they were to apply for payment of the rate.

LORD KENYON, C. J.—This is the landlord's tax. And, when the queſtion firſt came before the court, it was doubted whether a tenant, who was rated to, and paid the land-tax, ſhould gain a ſettlement by it: but in R. *v.* Bramley it was obſerved that "that doubt had been gotten over." But in this caſe no queſtion can ariſe: on the rate there is one column of the proprietors, and another of the tenants; but the names of the tenants were only inſerted in order to ſhew for what property the landlords were rated. And the juſtices in this caſe have ſtated (what I think they were bound to do) that the landlord was rated.

BULLER, J.—In R. *v.* Mitcham, (Cald. 276) R. *v.* St. Lawrence, (ib. 379), and R. *v.* Endon, (ib. 374), it was held that, as between the public and the tenant, the land-tax is the tenant's tax, though, as between the landlord and the tenant, it is otherwiſe; that, if it be doubtful on the rate itſelf, whether the landlord or the tenant be rated, it muſt be collected from other circumſtances; that the land-tax is *primâ facie* a tenant's tax, and that, if nothing appear to the contrary, the occupier muſt be preſumed to be the perſon rated. This idea was not adopted in theſe late caſes for the firſt time, for ſo long ago as in a caſe in 30 Geo. II. Foſter, *J. ſaid* "*the occupier* is the perſon who is to pay."

But



But whether the landlord or tenant be rated is a queſtion of fact, which ſhould always be found by the juſtices: here it is ſtated, and we are precluded, by their opinion, from entering into the queſtion. Order of ſeſſions affirmed.

REX, *v.* GUARDIANS OF THE POOR OF CHICHESTOR.

Two Juſtices in March 1789, adjudged one Lover reputed father of a baſtard. Lover appealed to the General Quarter Seſſions in April following, where the order of filiation was quaſhed.

The proceedings now came before the court, not upon a *caſe*, but by a *certiorari*, and it was moved to quaſh the order of Seſſions, becauſe the ſtatute 18 Eliz. c. 3. gives the appeal to the next General Seſſions, for this was a Quarter Seſſions, and it does not appear but that a General Seſſions might have intervened—and it was ſo held Rex, *v.* Shaw. Salk. 483.

LORD KENYON, C. J. ſaid that the caſe cited did not appear to be one of the moſt authentic in Salkeld's Reports; but it is a general rule that every intendment ſhall be made to ſupport an order of Juſtices, and as it does not appear that the General Quarter Seſſions, held on the 22d of April, were not the Seſſions next following the 27th March, we will not preſume it for the purpoſe of quaſhing the order of ſeſſions. Order of ſeſſions affirmed.

PETRIE AND ANOTHER, EXECUTORS OF PAGE KEEBLE, AGAINST HANNAY, BART.

The teſtator, Sadlier Petrie, and the defendant, were concerned in large ſtock ſpeculations on a joint account, the whole of which were illegal, except a transfer of 10,000 l. Having incurred many loſſes, they ſettled with Portis, their broker, who had paid the differences; and on that occaſion Keeble repaid Portis all the money advanced by him, except 811 l. which was part of the defendant's ſhare of the loſſes, and for which Keeble drew on him in favour of Portis, which the defendant accepted. N. B. 264 l. being the defendant's ſhare of the loſs on the legal tranſaction of 10,000 l. was included in the 811 l. The defendant not paying the bill when it became due, Portis brought an action, after Keeble's death, againſt his executors, the preſent plaintiffs, and recovered the amount, no defence being ſet up on account of the illegality of the tranſaction.

The

The preſent action was to re-imburſe the plaintiffs the money ſo paid for the defendant's uſe; and they recovered upon it at the ſittings before Lord Kenyon.

A rule was obtained, to ſhew cauſe why the verdict ſhould not be ſet aſide, or, at leaſt, reduced to the ſum of 264 l.

Bearcroft, Mingay, and Ruſſel, now ſhewed cauſe; and ſaid, this caſe was not within the ſtatute, 7 George II. c. 8, to prevent ſtockjobbing, as it was not an action to ſatisfy differences of ſtock, but to recover money paid to Portis under the defendant's authority; and they reſted upon the caſe of Faikney v. Reynous (4 Burrowes 2069), whence the defendant pleaded againſt a bond that it was for ſtockjobbing differences, and the court held that the plaintiff was entitled to recover what he had paid, though for an illegal purpoſe. At all events they contended they were entitled to recover the 264 l. as that was perfectly clear from any objection ariſing under the act.

Erſkine and Wood, *contra*, ſaid the tranſaction was altogether illegal, and came within the ſpirit of the act; and that the 264 l. could not be ſeparated, the whole being one general ſcheme of ſpeculation. Theſe parties were *participes criminis*, and one partner cannot call upon another for his contribution to a loſs ariſing out of a matter prohibited by law. Suppoſe a partnerſhip contract for ſmuggled goods, and one pays the whole, he would not be ſuffered to recover againſt the other.

LORD KENYON, C. J. — As to the 264 l. I have no doubt whatever. It was a fair tranſaction; the ſtock actually purchaſed, and the transfer made: none of the proviſions of the act were infringed; and it is too much to ſay that, becauſe the other tranſactions were invalid, this ſhall not be binding. But, on the principal queſtion, I have not formed a deciſive opinion; and I have not heard any argument to convince me that the plaintiffs' demand can be enforced. The great difficulty is to diſtinguiſh this caſe from that of Faikney *v.* Reynous; but that does not at preſent appear to me to conclude this queſtion. That was an action on a bond; and the whole argument at the bar, and the deciſion of the court, proceeded on the ground that they could not take into conſideration matter which was not properly introduced by the plea. And they thought that, as nothing illegal between thoſe parties was diſcloſed on the record, the payment of the money could not be reſiſted. But this is not the caſe of a bond; and, if we conſider this

caſe



caſe *à priori* on the ground of policy, and recollect the infinite miſchiefs brought on individuals by means of ſtock-jobbing, it is to be wiſhed that the remedies offered by the legiſlature ſhould extend to the whole miſchief. Now, I do not ſee how that can be done ſo effectually as by ſaying that no perſon, who is concerned in ſuch a tranſaction, ſhall recover any demand ariſing out of it in a court of law. The firſt action which was brought againſt theſe plaintiffs was on a bill of exchange, which had been accepted by the defendant on account of the loſſes. Now, it is clear that that action did not merge the original demand, and the whole tranſaction may ſtill be brought before the court; and, if it appear to the court that a bill of exchange is given without any conſideration, it is *nudum pactum ex quo non oritur actio*; or, if for an illegal conſideration, the whole matter may be examined. But, in the caſe of a bond, the conſideration cannot always be gone into, as in the inſtance of a voluntary bond. In this caſe the teſtator and the defendant were partners in an illegal tranſaction, in which Portis the broker acted as agent, knowing it to be contrary to law, ſince every man is bound to take notice of public laws. Now it is a rule that thoſe, who come into a court of juſtice to ſeek redreſs, muſt come with clean hands, and muſt diſcloſe a tranſaction warranted by law. And I cannot diſtinguiſh this caſe from that of ſmuggling, put at the bar, where, if one of two partners advance money in a ſmuggling tranſaction, he cannot recover his proportion of it againſt his partner, becauſe the tranſaction is prohibited; and yet ſmuggling is not *malum in ſe*, as contradiſtinguiſhed from *malum prohibitum*. If this tranſaction had been diſcloſed in the former action, Portis could not have recovered. Now, ſuppoſing the bill of exchange puts the plaintiffs in his ſituation, they are not aſſiſted by it; or conſidering them, on the other hand, ſtanding in their own ſituation, unconnected with Portis, they then appear as partners in a matter prohibited by the laws of the country, and cannot therefore have recourſe to thoſe laws to enforce their contract. But at preſent I ſpeak with great diffidence; and I ſhall be glad to correct this opinion, if, on reconſideration, I find I am miſtaken. I wiſh however to have it underſtood, that I do not mean to diſturb the caſe of Faikney v. Reynous; there the court did not think themſelves warranted in ſaying that ſufficient was diſcloſed on the record to bring the caſe within the ſtatute: but here the whole tranſaction may be enquired into, which, on examination, *is, I think, prohibited* by that act.

ASHHURST,

ASHHURST, J.—I think that this caſe muſt be governed by that of Faikney v. Reynous; and, if we were to determine now for the defendant, we muſt overturn that caſe. The court did not proceed in that caſe on the ground that it was an action on the bond, for they permitted a diſcuſſion of the facts: but they ſaid, that, even admitting them to be true, ſtill it was no defence to the action; and Lord Mansfield and the whole court proceeded on the ground, that as it was not *malum in ſe*, but only *malum prohibitum*, and as the plaintiff was not concerned in the uſe which the other made of the money, it was a fair tranſaction between thoſe parties. I ſee no difference between that caſe and the preſent.

BULLER, J.—About the 264l. there can be no doubt. But, in order to conſider the great queſtion in the caſe, whether the plaintiffs are entitled to recover the large ſum under the circumſtances which are diſcloſed, it is neceſſary to trace this tranſaction to its origin, for it very much depends on the light in which this queſtion muſt have been conſidered, if Portis had been the plaintiff. We may, I think, infer that the defendant conſented, and requeſted Portis to pay the differences in the ſtocks. And here I agree that, in the caſe of an illegal tranſaction, if one perſon pay money for another, without an expreſs authority, he cannot recover it back; for there is a wide difference between partners in legal and illegal contracts: in the former, if one of the partners pay the whole of a partnerſhip debt without any expreſs promiſe from the other, the law gives him a right to recover it back in an action for money paid to the uſe of that other partner; and it proceeds on this ground, that both are liable to pay. But in the caſe of illegal contracts, as they are not bound to pay, one of them cannot acquire a right of action againſt the other by paying the whole without his conſent; but he muſt have the conſent of that other. The queſtion therefore here is, whether the court cannot infer from the evidence, that the money was paid with the authority of the defendant; and I think we are bound to draw that concluſion. It appears that the defendant agreed to pay his proportion of the loſs, and accepted a Bill drawn on him by Keeble in favour of Portis. How then would the caſe have ſtood, if Portis had been the plaintiff? And here I agree with my brother Aſhhurſt, that, as Portis paid the money with the conſent of the defendant, he would be entitled to recover it back again, unleſs the determination of Faikney v. Reynous be not law. Some light may perhaps be thrown on that caſe,

from



from conſidering the time when it was argued: It came before the court in E. 7 Geo. III. juſt at the time when the queſtion in pleading, whether a defendant could aver any thing *dehors* the condition of the bond, had undergone much diſcuſſion in Weſtminſter-hall. But it is now fully ſettled, that matter *dehors* the bond may be pleaded. And it would be highly inconvenient if it were otherwiſe; for no perſon who is engaging in an illegal tranſaction would be ſo abſurd as to ſtate the illegality of it on the bond itſelf. In Faikney *v.* Reynous Lord Mansfield was ſilent on the queſtion of pleading; and he gave his opinion on the general ground, that if one perſon apply to another to pay his debt (whether contracted on the ſcore of uſury, or for any other purpoſe, it makes no difference) he is entitled to recover it back again. And he did not ſeem to conſider that there was any diſtinction, whether the debt aroſe on a bond or other ſecurity. The three other judges alſo concurred; and ſaid, "that it remained a good bond on the "face of it, till the obligor ſhewed that it was bad." So that the concluſion drawn by them is, that the tranſaction, as diſcloſed by the plea, did not make it illegal as between thoſe parties. Therefore I think that this caſe is governed by that of Faikney *v.* Reynous.

GROSE, J.—I agree clearly as to the ſmaller ſum; and I cannot diſtinguiſh this caſe from that of Faikney *v.* Reynous, upon which I give my judgment.

Rule diſcharged.

ROLLESTON *and others, Aſſignees of* MARGETSON, *a Bankrupt*, v. HIBBERT *and others.*

On an action of trover for a ſhip, the general iſſue was pleaded, and the following caſe reſerved.

CASE.

The bankrupt being indebted to the defendants in 2000l. on bills, which they had accepted and paid for him, on the 21ſt of June, 1788, gave them his promiſſory note, payable in three months; and, by way of ſecurity, executed to them a bill of ſale of the ſhip Commerce, and, at the ſame time, depoſited in their hands the grand bill of ſale, and alſo a policy of inſurance on the ſhip from London to Jamaica, and back again. The bill of ſale was *abſolute* on the face of it, and in the uſual form, but it did not contain a recital of the certificate of the *regiſtry of the ſhip*, as required by ſtat. 26 Geo. III. cap. 60.

§ 17.

§ 17. But at the time when the bankrupt executed the bill of ſale, and depoſited that, together with the grand bill of ſale and policy, with the defendants, they gave him an *acknowledgment in writing, promiſing to return the ſame upon payment of the note.* On the 21ſt of June, 1788, the ſhip was in foreign parts, and did not arrive in England till the 22d of November, 1788. The bankrupt ſtopped payment the 3d of July, 1788. On the 18th of the ſame month, a commiſſion was iſſued againſt him; and on the 8th of Auguſt his effects were aſſigned to the plaintiffs. Immediately on the ſhip's arrival in England, the defendants took poſſeſſion of her, and ſtill continue in poſſeſſion. After the 21ſt of June, 1788, and before his bankruptcy, the bankrupt paid to his creditors, in the courſe of his trade, between 3000 l. and 4000 l. And it was alſo found by the caſe, that the bill of ſale was not executed by the bankrupt in contemplation of bankruptcy.

Shepherd, for plaintiffs, ſaid, the defendants could not detain the ſhip either as a *purchaſe* or a *lien*. It could not be a ſale, becauſe the ſtatute 26 Geo. III. cap. 60, § 17, enacts "that when and ſo often as the property in any "ſhip of a Britiſh ſubject ſhall be transferred to any other "Britiſh ſubject, in whole, or in part, the *certificate of* "*the regiſtry* of ſuch ſhip *ſhall be truly recited in the bill, or* "*other inſtrument of ſale, otherwiſe ſuch bill of ſale ſhall be* "*utterly null and void*, to all intents and purpoſes." Therefore the ſale of this ſhip is void, and the bill of ſale a nullity. The defendant cannot have a lien to enable him to retain the ſhip to ſatisfy his demand; for, as the bill of ſale is void, there is nothing to ſhew the ſhip was delivered for any ſpecific purpoſe. And if any thing in this tranſaction could make it binding in a court of law as a lien, *an intereſt* would be created in the ſhip, which is expreſsly provided againſt by the ſtatute. Foreigners might claim in the ſame manner, and the whole policy of the law ſubverted.

The counſel on the other ſide ſpoke very fully; but, as the chief arguments were afterwards recited by the judges, it is needleſs to give them in this place.

LORD KENYON, C. J.—The queſtion is, whether this bill of ſale is an effective inſtrument to convey the property. The ſtatute declares, in the moſt poſitive terms, ſuch bill of ſale to be abſolutely void. In anſwer to which it was argued, that it was not neceſſary this property ſhould be conveyed by a written inſtrument; but certainly, if the parties do ſo convey, they ſhall not refer to any other agreement. And here the title of the defendants being reduced



duced to writing, though it be void, they cannot go into any other agreement. It is like the caſe of a bill of ſale without ſtamps, which could not be produced in evidence; but the vendor would not be ſuffered to reſort to parole-evidence of the agreement.

It is argued that this ſtatute does not apply to *tranſfer of ſhips at ſea*, it being impoſſible to comply with the act in that caſe, becauſe, the certificate being on board the ſhip, reference could not be had thereto; but the words of the 17th ſection are general, and make no exception of ſuch caſes; beſides the parties might recur to the regiſtry at the Cuſtom-houſe, where a duplicate is kept. Then it is ſaid, the defendants had a lien on the ſhip to the amount of their demand; but that is not ſo, for the bill of ſale profeſſes to convey the abſolute property. And ſuppoſing that the bankrupt had never called for a return of the ſhip, from what time can the title of the vendees be ſaid to accrue? Was it only from the time when the ſum of 2000 l. became due, and was not paid? On payment of that ſum indeed the vendor would have had a right to call for a return of the ſhip; but that could not diveſt the intermediate property of the vendors under the bill of ſale. The law was ſo with reſpect to real property, prior to the 14th Geo. II. cap. 20; before which time conditional ſurrenders were made by tenants for life to make good tenants to the *præcipe* to ſuffer common recoveries, which ſurrenders were to be avoided by the payment of large ſums on particular days, when the ſurrenderees were to reconvey: now, if during that interval the whole property did not paſs to the ſurrenderees, ſuch recoveries would have been void; but undoubtedly the property did paſs in ſuch caſes. So in the caſe of a mortgage, where a deſcent is caſt before it becomes abſolute, the legal eſtate muſt deſcend according to the terms of the mortgage, notwithſtanding the day of redemption is not paſſed. There is nothing in the act of parliament to warrant our giving effect to this bill of ſale.

ASHHURST, J.—If we decide this bill of ſale to be good to a *particular intent*, we ſhould go in direct oppoſition to the ſtatute, which renders all bills of ſale, which do not comply with the requiſites of the act, *null and void, to all intents and purpoſes*. It is ſaid the ſtatute could not be complied with, becauſe the certificate was with the ſhip at ſea at the time the bill of ſale was made; but that is fully anſwered, as they might have extracted it from the regiſtry at the Cuſtom-houſe. Then it is ſaid the defendants have a lien on the ſhip, and may retain the poſſeſſion. That

might

might be an argument againſt the bankrupt himſelf; but, ſince the bankruptcy, all the creditors have an equitable lien on his eſtate; and when two equities meet, the legal title muſt prevail, which is with the plaintiff.

BULLER, J.—It is a hard caſe, that the defendants, who have acted fairly, ſhould loſe the benefit of their ſecurity; but it is impoſſible to get over the ſtatute. It has been contended that this caſe is not within the act; 1ſt, as the ſhip was ſold at ſea; and, 2dly, becauſe the defendants acquired no right to navigate the ſhip, which was the only object of the legiſlature. As to the firſt: I think that the other clauſes of the ſtatute are deciſively againſt it; becauſe the caſe of a ſale of a ſhip, either at ſea or in a foreign port *to a foreigner*, is expreſsly provided for by the 15th ſection; then, if we ſee that in one part of this ſtatute the legiſlature had in view the ſale of a ſhip at ſea or in a foreign port, and made ſpecial proviſions for ſuch a purchaſe by a foreigner, it cannot be argued that the ſelling of a ſhip at ſea in other caſes was not in the contemplation of the legiſlature: but it ſhews that they only intended to make one exception, leaving all other caſes within the general words of the 17th ſection. Beſides, before ſuch an argument ought to be adopted, it ought to appear that, beyond all controverſy, the parties could not comply with the requiſites of the ſtatute, and that this was a *caſus omiſſus*; which is by no means to be collected from the ſtatute.

The ſecond ground of objection is not well-founded, becauſe there is an abſolute tranſfer of the property by the bill of ſale; whereas, to found that argument, it ought to have been ſhewn that, independently of this act of parliament, the defendants had no right to navigate the ſhip under the title they had acquired. If ſuch an argument could prevail, it would be ſaying that every inſtrument might avail, though expreſsly declared void by ſtatute. It was argued, that the 17th ſection of the ſtatute *cannot extend to all caſes*; but that has always been conſidered as an excepted caſe; and this is a *tranſfer by the party*. It was then contended, that if the plaintiffs had filed a Bill of Chancery to compel poſſeſſion, they muſt firſt have ſatisfied the demand; but that argument is not applicable here; for, in that court, he who aſks equity muſt firſt do equity; and, if ſuch a bill would have been diſmiſſed, it would be becauſe the demand was unconſcientious; but that would not decide the property of the ſhip. The argument ought to go further, and ſhew that, if the defendants in this caſe had

applied



applied to a court of equity for the ſhip, that court would have decreed it. I know of no ſuch caſe. Had this been the practice of a court of equity, it would have had great weight with me; for, in my opinion, nothing can be more unfortunate for the ſubject, than that different rules reſpecting property ſhould prevail in the different courts, and in mercantile tranſactions particularly. If the defendants have a clear, equitable title, we ſitting in this court ought not to permit the poſſeſſion to be taken from them.

GROSE, J. concurred in opinion; and ſaid, this is an abſolute bill of ſale conceived in the ſtrongeſt terms; the vendor could not make a more complete title; and the vendee might (if the ſtatute had been complied with), have carried this inſtrument to market. The acknowledgments ſigned by the defendants only gave a right of action to the vendor, in caſe the bill of ſale was not returned, but it did not affect the property in the ſhip.

Poſtea, for the plaintiffs.

HOLLOWAY, v. BENNETT.

A *qui tam* action had been tried at the aſſizes for ſome penalties of 50 l. under the Silk-Weavers Act, 13 Geo. III. cap. 68. § 5. and verdict given for the defendant, with one penalty *generally*; but the plaintiff's counſel choſe to apply it to a *particular count*, and the *poſtea* was indorſed accordingly: the verdict on this count being confeſſedly bad in point of law, the queſtion now was, whether the finding could be applied to other counts that were good.

LORD KENYON, C. J.—As this is a penal action, and the plaintiff has elected to enter the verdict on one count, he ſhall not now reſort to another. For though the jury would in ſome caſes have no difficulty in giving their verdict on *any* count, yet in others that would not be warranted. And though in this caſe the verdict was general, the application of it by the plaintiff's counſel to one point muſt bind them. And it is admitted *this count* cannot be ſupported, therefore The judgment was arreſted.

REX, v. WITHERS.

The defendant, having been convicted of writing and publiſhing a libel againſt Mrs. Fitzherbert, was brought up for judgment.

Erſkine, againſt the defendant, produced, in order to aggravate the ſentence, a pamphlet written by the defendant after

after the trial, and more libellous than that for which he had been convicted.

Dallas, for the defendant, objected, and ſaid, that this ſecond publication might be proſecuted as a new crime, but could not be brought to aggravate the preſent puniſhment. It was depriving his client of the advantages of trial; and, as he was liable to be proſecuted for it afterwards, if it was now taken into conſideration, he might, in effect, be puniſhed twice for the ſame offence.

LORD KENYON, C. J. ſaid, the ſubſequent conduct of the defendant is generally brought to extenuate the offence; but it may alſo be produced in aggravation, though the court in ſuch caſe will inflict no greater puniſhment than the principal offence would warrant; but the defendant ſhould be allowed time to anſwer the preſent affidavit.

He was accordingly brought up on a ſubſequent day, and, producing no affidavits in anſwer, was ſentenced to pay a fine of 50 l. to be impriſoned twelve months in Newgate, and find ſureties for his good behaviour for three years.

DAVIES, *v.* COTTLE.

A rule was obtained by the defendant, to ſhew cauſe why there ſhould not be the ſame judgment as in caſe of non-ſuit, on the uſual affidavit that the plaintiff had not proceeded to trial, after giving regular notice: this rule was afterwards diſcharged on an affidavit from the plaintiff, that the defendant had agreed to pay 12 guineas, on condition the action was diſcontinued; and that this agreement took place ſubſequent to the ſaid notice of trial.

Motion to diſcharge the ſecond rule, three perſons ſwearing that the plaintiff's affidavit was utterly untrue.

LORD KENYON, C. J.—The court will not go into the ſubject again on the ground of coſts only: the plaintiff may be indicted if he has ſworn falſely. The court might perhaps have given time to examine into the matter, if it had been urged, *at the time*, that the affidavit was falſe.

Rule refuſed.

WAUGH, *v.* AUSTIN.

Between the interlocutory and final judgment, the plaintiff became a bankrupt, and ſued out execution *in his own name, and charged the* defendant in cuſtody of the



marſhal. The queſtion was, whether the aſſignees ſhould not have ſued out a *ſcire facias* to revive the judgment, and then have charged the defendant in execution.

Wood in ſupport of the *execution*, cited Bibbin *v.* Mantel, (2 Wilſon, 358); where plaintiff became bankrupt after the interlocutory, and executed a writ of enquiry in his own name.

Baldwin, contra, ſaid, that the defendant in this caſe had no opportunity of pleading, and was therefore without remedy, unleſs the court aſſiſted him.

By the court.—The bankruptcy of the plaintiff does not abate the ſuit; and aſſignees frequently continue the bankrupt's ſuit in his name.

Application diſmiſſed.

BARRINGTON, *v.* Rex, *in Error.*

Writ of Error to reverſe an Outlawry in Felony.

It was aſſigned for error, *inter alia*,

I. That the writ of *capias cum proclamatione*, alleged to be iſſued, does not require the ſaid G. Barrington *to render himſelf to the ſheriff of* Middleſex, *ſo that the ſaid ſheriff might have his body before the juſtices therein named at the return of the ſaid writ*, as by law it ought to have been done; but, on the contrary thereof, *requires the ſaid* G. Barrington *to be before the juſtices at the return of the ſaid writ*, which is contrary to the law of the land.

II. That the ſaid writ of proclamation does not appear to be iſſued or executed as the ſtatute in that caſe made and provided requires.

III. That it is not alleged, that the ſaid G. Barrington was exacted, or demanded, at the Sheriff's County-Court of Middleſex, holden at the houſe known by the name of the Sheriff's-Office in Took's-Court, Curſitor-Street, and in and for the county of Middleſex, as by law it ought to have been.

IV. That the ſaid G. Barrington is alleged to be a fifth time demanded and outlawed on the 21ſt day of February in the 28th year, &c. when it appears by the ſaid writ of *capias cum proclamatione*, and the ſaid proclamation returned thereon, that he the ſaid G. Barrington had a day given, to be before the juſtices therein named, until the general ſeſſion of the peace next after the 1ſt day of February, in the 28th year, &c. being the 25th day of that month.

Lord

LORD KENYON, C. J.—I am very glad, from the clearneſs of one of the objections, to be relieved from the neceſſity of giving any opinion on the others. The proceedings in this caſe impute to the priſoner, that he has been guilty of diſobedience of the law: they require, that he ſhould render himſelf to the juſtices at the general ſeſſions of the peace next after the 1ſt of February then next enſuing; and that time is aſcertained, by another part of the record, to be on the 25th of February: but, before that day arrived, namely, on the 21ſt of February, the ſentence of outlawry is pronounced on him. It is clear that the diſobedience of the law, for which he was to be puniſhed, never happened; for the day was not arrived, on which he was required to render himſelf. Therefore, on the plaineſt principles of common ſenſe, without looking after critical objections, I am of opinion, that this outlawry muſt be reverſed.

ASHHURST, J.—of the ſame opinion.

BULLER, J.—I am glad that we are not called upon to give any opinion on the third objection; though I confeſs I have a ſtrong opinion upon it. I do not know that it has ever been determined, that, in any return made by a ſheriff, any technical form of words is neceſſary: certain requiſites muſt be obſerved; but, if obſerved in ſubſtance, and the return be not in equivocal terms, a great deal of argument is neceſſary to convince me that ſuch a return is bad. But the laſt objection is perfectly clear. The ſtatute, 8 Hen. VI. cap. 10, which has been referred to, has no relation to this caſe: that act only applies to indictments in one county againſt offenders reſiding in another, and only to caſes where it appears, on the face of the indictment, that he does reſide out of the county. There the legiſlature have required that a proclamation ſhall iſſue with a ſecond capias, and go into the county where the perſon indicted lives; and, it is true, in ſuch a caſe, the writ muſt require the perſon indicted to appear before the juſtices at the return of the writ: but that return is before the time of the outlawry; for there muſt be a *pluries capias* before the outlawry can iſſue; all thoſe are preparatory ſteps to the outlawry, and the priſoner's appearance is required in order to prevent the outlawry. But this is a very different caſe; for here the writ is returnable after the outlawry is complete. In looking into the precedents on this ſubject, there is one of The King v. Cranſtoun, for the murder of Mr. Blandy, which deſerves attention, *becauſe* ſome of the moſt eminent gen-



tlemen of the profeſſion were employed in it; and therefore it is natural to ſuppoſe that great care was taken in ſettling that outlawry; and in that I obſerve, that the writ of *capias cum proclamatione* required Cranſtoun *to render himſelf to the ſheriff, ſo that the ſheriff might have his body before the juſtices at the return*, &c. The form of outlawry in civil caſes is alſo material to be conſidered. The ſtat. 31 El. cap. 3. ſettles the form in *civil* proceedings; and 4 & 5 W. cap. 22. § 4. extends the proviſions of the former act to *criminal* caſes, *before judgment*. For there is a difference in that reſpect, whether the outlawry be *after* or *before* judgment; for, if after judgment, no proclamation is neceſſary. And unleſs that diſtinction be attended to in Wilkes's caſe, that caſe, as reported in Burrow, may miſlead; for the arguments are not ſtated. In fact, that was an outlawry *after* conviction, and therefore it did not come within the ſtatute of W. & M. But that ſtatute extends the proviſions of the 31 El. to criminal caſes before judgment; and therefore that, which has prevailed in civil caſes, is a fair rule in this caſe. Now, in civil caſes, the writ of *capias cum proclamatione* univerſally requires the perſon indicted *to render himſelf to the ſheriff, ſo that the ſheriff may have his body before the juſtices at the return*, &c. Therefore it ſeems to me, that this is a deciſive objection, and that the outlawry muſt be reverſed.

GROSE, J.—I am glad not to be obliged to give any opinion on the other objection; for the laſt appears to be deciſive. It ſeems abſurd to pronounce a judgment of outlawry againſt a perſon on the 21ſt of February, for not appearing on the 25th of the ſame month.

Outlawry reverſed.

Priſoner remanded for trial, and reſtored to his former rights.

He was accordingly tried in the December ſeſſions, 1789, at the Old Bailey.

Trial of GEORGE BARRINGTON.

George Barrington was indicted for feloniouſly ſtealing, on the 19th of January, in the 29th year of his preſent Majeſty's reign, at the pariſh of St. Martin in the Fields, a ſilk purſe value 2d. and twenty-three guineas, value 24l. 3s. and one half-guinea, value 10s. 6d. the property of Havilard Le Meſurier, Eſq. privily from his perſon.

Before the Jury were ſworn, the priſoner ſaid, 'I beg leave to challenge them. I own that I am acting under the influence

influence of a report which is, perhaps, very untrue.—I mean no reflection;' upon which the ſecond Middleſex Jury was put in the place of the firſt.

Havilard Le Meſurier. I was at the play-houſe in Drury-lane, on the 19th of January, 1787; I ſaw the priſoner there; it was at the end of the play: I left my party to meet my ſervants. As I came into the lobby, I obſerved it was exceſſively crowded: a circumſtance then ſtruck me of having a great deal of money in my purſe, which led me to be extremely on my guard. When I got into the lobby, I put my watch-chain very deep in my fob, and put my left hand down to guard my pocket. I went along, preſſing through the crowd to get to my ſervants; I felt my purſe move, and, on feeling my purſe move, I immediately got a hand up in this manner with my right hand, and with my left I turned round to ſeize the perſon whoſe hand I had. I ſeized the priſoner's hand cloſe to my pocket, and with the other hand I turned round and ſeized his perſon. I did not ſay any thing to the priſoner; my aim and wiſh was to recover my purſe, which I thought was in his hand. I had not time to ſeize upon him; for a clergyman, Mr. Adean, ſtept up and ſaid, Sir, you are right, I ſaw him do it. Mr. Adean is now abroad. There were people all round: on Mr. Adean's ſtepping up to me, on my having his hand up ſtill, a gentleman from the other ſide called out, Sir, here is your purſe; and delivered me my purſe. It was inſtantly on feeling my purſe move that I caught the hand; there was no interval whatever; neither the priſoner's hand, or any hand, was ever in my pocket; my breeches pocket was never unbuttoned; my purſe, although it contained twenty-three guineas and a half, which is a weight, got through my pocket without being unbuttoned; and, on examining my breeches afterwards, I found that my breeches was cut through. No hand was in my pocket; Mr. Adean and myſelf kept poſſeſſion of the priſoner's perſon; after having recovered the purſe, I had the care of it, and it being known there was money in it, I got hold of his perſon with my left hand; there was a great deal of trouble; we were ſhoved about. But I ought to ſtate, that the priſoner on my ſeizing him, and on Mr. Adean's aſſiſting me, ſaid, What do you mean? I am a gentleman; conſider, Sir, what you are doing, I am a gentleman; only conſider the conſequence of this, for God's ſake conſider. The priſoner was extremely pale and confuſed; I kept aſking him, who are you? to which he gave me no anſwer, only ſaying he was a gentleman. We called out for a conſtable, and after

ſome



ſome time a conſtable came; we aſked the conſtable, who was the unfortunate Blandy, if he knew him; he looked at him very hard, and ſaid, No, I do not know the priſoner. After a great deal of difficulty he was had to the Brown Bear, where I delivered him to the cuſtody of Blandy. I attended the next day at the office in Bow-ſtreet, but the priſoner was not there. It was a ſtriped ſilk purſe, with twenty-three guineas and a half. It was merely the lining of the pocket that was cut, perhaps a couple of inches through the upper part of the pocket. When the conſtable ſaid it was not Barrington, Mr. Adean ſaid, I ſaw him take it, and I will lay down my life on the occaſion. I believe I ſaid in Bow ſtreet, that I ſeized a perſon's hand near to my pocket, which hand appeared to be the defendant's, and that I therefore believed and ſuſpected that the defendant was the perſon that robbed me.

Queſtion from the Jury.—When you ſeized the priſoner, was he on your right hand or the left?—He was behind me; the perſon that gave me the purſe was on one ſide. I was ſtanding in this manner: I had the priſoner's hand, and the firſt idea I had was, it belonged to the perſon that was before me, but jerking it up, I found that it belonged to the priſoner.

Court. You ſay the priſoner was behind you?—Yes. Where was the hand?—The hand was cloſe to my pocket, and he was behind me.

Jury. Did you keep faſt hold of him by the hand till you laid hold of him with the other hand?—Yes.

Why had you any doubt in Bow-ſtreet?—I had no doubt: my idea was, the hand belonged to the man that was before me, and I wanted to know to whom the hand belonged, and, jerking it up, I found it belonged to the priſoner.

Yes, but you ſaid in Bow-ſtreet, that it *appeared* to belong to the priſoner, and you *ſuſpected* it was him that robbed you?—That word *appeared* I never meant; and if I made uſe of it in Bow-ſtreet, I never meant it.

Priſoner's Defence.

May it pleaſe your Lordſhip, and you Gentlemen of the Jury; the benignity and candour which mark the judicial proceedings of this country, of which I have recently met a diſtinguiſhed proof, induce me to hope, with the utmoſt humility, that the indulgent attention of the Court will not be withheld on the preſent occaſion; but that it will be extended, not through the merit of any thing I may urge, but from the generous and impartial impulſe of your own

minds.

minds towards every one who is ſo unhappy as to ſtand here, the ſubject of accuſation; and if ever there was a caſe which called for the calm, I will not ſay the compaſſionate, conſideration of your Lordſhip and the Gentlemen of the Jury, it is perhaps the preſent, as well from the heavy affliction I have ſuſtained for many months before I could obtain a trial, as from the newſpaper calumny that has been levelled againſt me, even under the preſſure of a long impriſonment, and to the very hour of my trial.

It is but too true, that I had the misfortune to be at the play about the time mentioned in the indictment; I had ſometimes an opportunity to obtain an order for the play, through the medium of a reſpectable though no very intimate friend; and it is unneceſſary for me to ſay, that the part of the houſe is not thought material in general when an order is given. I was going through the box-paſſage on my way home, when ſome one ſaid it is certainly Barrington, and almoſt at the ſame inſtant I was addreſſed by a perſon who requeſted me to tell my name; I aſked his reaſon for the enquiry; he turned from me, and ſaid, Mr. Le Meſurier, is this the perſon? The proſecutor ſaid he had loſt his purſe, and that I was near him, but no more; the paſſage was extremely crowded, and this converſation excited the general attention: ſome of the byſtanders requeſted I would give my name. I told them I ſhould decline giving my name there, the matter being of an unpleaſant nature; but that, if there was any charge againſt me, I had no objection to go before a magiſtrate. Some gentlemen cloſe to the proſecutor obſerved, that ſuch a ſtep would be quite unneceſſary, if I would call on any gentleman preſent; while others ſaid that my name was Barrington: the proſecutor in the mean time was no way active on the occaſion, or like a man that was at all convinced in his own mind; and an altercation merely about my name continued, I may venture to ſay, pretty near half an hour; when the approach of the conſtable was announced, the crowd was ſo great it was with great difficulty they could come near; and then being aſked concerning me, he ſaid he could not recollect me, or words to that effect. Some gentlemen continued to ſuggeſt the propriety of my calling on ſome perſon that knew me, which they ſaid would entirely do away all imputation; while others ſaid, Mr. Le Meſurier, you ſhould go before Sir Sampſon Wright. Mr. Le Meſurier then abſolutely replied, What is the uſe of my going there? I am not ſure; I can ſay nothing to affect him. This, Gentlemen of the *Jury, was really* the language of Mr. Le Meſu-

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rier then, however it may have been forgot; however it may have been changed ſince, to anſwer the preſent purpoſe: ſome little altercation further continued about my name, when ſome one ſaid, Here is Townſhend of Bow-ſtreet, he perhaps knows ſomething of the priſoner, let us hear what he ſays. When he mentioned my name, ſome gentleman ſaid, I told you how it was; when ſeveral other gentlemen obſerved that my name was then quite immaterial from the declaration that Mr. Le Meſurier had made; that, if Mr. Le Meſurier had been convinced of the fact in his own mind, I ought to have been taken before a magiſtrate, whoever I was, or whatever my name was; but that, as he had declared he was by no means certain, it was neither fair nor reaſonable that a man ſhould be criminated becauſe his name was Barrington. This, Gentlemen of the Jury, was the opinion of many gentlemen; ſome of whom, I am ſatisfied, Mr. Le Meſurier well knows to be ſuch, and the majority of the company concurred in that opinion. The altercation ſtill continued about my name; and it may appear ſtrange, perhaps incredible, that I, who about half an hour before was accuſed with a breach of the peace, and as an offender, ſhould be then actually employed as moderator in endeavouring to appeaſe the generous impulſe that prevailed in my favour, by requeſting that the matter might have a legal hearing: ſuch, however, Gentlemen was the fact. I was conveyed to the publick-houſe, the Brown Bear in Bow-ſtreet; and however the unhappy circumſtance of my withdrawing from thence may have hitherto operated to my diſadvantage, I truſt, that when the circumſtances of the caſe are duly and candidly conſidered, it will loſe that effect. I found myſelf there under a charge that I clearly perceived looked up to ſomething for its ſupport, beyond facts and circumſtances; I had juſt ſeen a ſtriking proof what prejudice may be attached to a name; and it was impoſſible for me to ſay how far it might not extend. Under apprehenſion, at once natural and alarming, an opportunity occurred to enable me to withdraw, and I embraced it—unfortunately embraced it! I broke no gaol nor watch-houſe on the occaſion; no judicial proſecution, or commitment, had taken place; and I truſt that it may fairly be conſtrued rather as a retreat from prejudice, than as a flight from accuſation; in leaving that place, gentlemen, I neither uſed violence or pecuniary influence, whatever has been ſuggeſted to the contrary; and here it is impoſſible for me to forbear moſt ſolemnly declaring, in the preſence of the court and the *world*, that the unhappy man who was convicted for ſuf-

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fering me to eſcape, was neither wilfully, or wittingly, conſenting thereto: if I was of a diſpoſition to rejoice at the calamity of a fellow-creature, I perhaps had ſome reaſon for it there; for this poor man, inſtead of doing me any kindneſs, was perhaps one of the greateſt enemies I had in the world, ſo far, gentlemen of the jury, as bringing up my name conſtantly in the minds of the public every night at the play-houſe; and if I was two hundred miles from London, if I was at any part of the univerſe, it was immaterial to him; this was ſtill done; it was his conſtant rule. It is true, that the unhappy man was convicted on evidence; for Townſhend ſwore that he muſt know of my retreat. Gentlemen of the jury, this poor man was a tradeſman, and a ſhop-keeper; this took up his attention in the day, and in the evening he attended his duty as conſtable; and he was, beſide that, an old infirm man; and perhaps, in the beſt of his days, he never poſſeſſed that keeneſs of ſight which they do who are runners by profeſſion; and I truſt, gentlemen, that ſome little attention will be paid to what I ſay on this occaſion; I have now no longer any intereſt from it; and he, poor man, can bear no part of it; he is freed now from the ſtrife of life, and not entangled with the perplexities of juſtice; but it is a tribute due to the memory of an unfortunate man, and I think myſelf bound to pay it, whatever my own caſe may be. And, gentlemen of the jury, it is with very great concern indeed, that I find myſelf under the neceſſity to ſay any thing which perhaps may appear invidious or impertinent; I wiſh not to ſay any thing that may look like a reflection on the conduct of the proſecutor; and if his memory had not been of the ſtrange nature that I know it to be, I certainly would not ſay any thing on the occaſion; but it is a memory of the moſt convenient nature; for it can forget circumſtances which happened, becauſe they were in my favour; and can fancy others which never did happen, and it can remember only thoſe which may injure and tend to convict me: I therefore, gentlemen, am compelled to ſay ſomething about the conduct of the proſecutor; the veneration I feel for the wiſdom and beneficence of the court, whoſe judgment reſtored me to the deareſt privilege of the ſubject, the trial by jury, will not permit me to ſay any thing concerning the law itſelf, and but little concerning the proſecution; yet thus much I hope I may be allowed to ſay without incurring the diſpleaſure of the court; that outlawry is the greateſt poſſible ad-



advantage that can be taken by the law of this country, that it ſets aſide the invaluable privilege of the ſubject, the trial by jury, and condemns a man to death unheard; that it was an advantage which the proſecutor derived from real ignorance on my part; that the proſecutor, if he had been the moſt vindictive, and the moſt cruel man that ever lived in this country, could not have attempted to do more againſt the blackeſt traitor, or the moſt foul murderer that ever appeared in the ſhape of human nature. Gentlemen of the jury, I am very far from attempting to extenuate the offence I am charged with; I am conſcious of its enormity; I never will commit it; but I hope I may be allowed to ſay, that there is an immutable diſtinction in crimes; that policy and humanity demand the preſervation of that diſtinction; if I had been the moſt violent, if I had been the moſt inhuman man that ever lived, it was impoſſible that Mr. Le Meſurier could have proceeded to greater extremity than he has done with reſpect to me. Gentlemen of the jury, if Mr. Le Meſurier had wiſhed to have impreſſed you with an idea of his candour, he might effectually have done it, by waving that advantage which ignorance on my part gave; and had he, inſtead of calling an unfortunate fellow-creature before the judgment-ſeat, to demand ſentence of death againſt him, and to urge it with all the rigour that a furious mind could dictate: had he omitted this in a moment when the moſt liberal and humane ſentiments ſeemed to prevail in every part of the world; had he done this, you might have had ſome opinion of his candour; it would not have tarniſhed the luſtre of his beneficence, or diminiſhed the fame of his moderation and modeſty. The language of Mr. Le Meſurier, the counſel, I will not much mention; I am convinced it ſpeaks for itſelf, and will operate more in my favour in any liberal mind, than any thing I can ſay againſt it: and perhaps he has been led to ſuch vehemence, by being at once the brother and counſel of the proſecutor: and I wiſh, I wiſh, gentlemen of the jury, that Mr. Le Meſurier may not have been adviſed to ſuch extremity from a quarter, where, of all others, it ought not to have proceeded: public juſtice is a good and neceſſary thing, but there is ſomething due to individual juſtice; and a perſecuting ſpirit ſhould never be ſuffered to overpower the ſacred rights of truth and humanity. And permit me humbly to obſerve, that the queſtion is not now, what the private opinion of individuals concerning *George Barrington* may be, but whether there is, or is

not, that full, clear, and unequivocal evidence which the wiſdom of ages has eſtabliſhed as the criterion for jurors to decide by, and which ought never to be departed from, in any man's caſe whatever. To ſtrain a point to acquit, may proceed from Godlike motives; and perhaps men of the moſt vindictive tempers muſt reſpect, in others, the benevolent impulſe; but to ſtrain a point to condemn, is repugnant to juſtice, to conſcience, and to humanity.

Here the learned Judge ASHHURST *ſummed up the evidence, and added the following obſervations:* He ſaid, there are ſome facts ariſing from Mr. Le Meſurier's evidence, which ſeem to apply pretty cloſely to the caſe of the priſoner; there is one fact particularly, which came out upon the croſs-examination, which may be material for your conſideration; that is, that Mr. Le Meſurier told you, at the time he felt his purſe move, the priſoner was ſtanding behind him, but his hand was cloſe to his pocket: now to be ſure, in the natural poſition one would expect for a man who ſtood behind another perſon, it is not very probable that his hand could be ſo far advanced before Mr. Le Meſurier as to be at his breeches-pocket; therefore that obſervation, in point of probability, ſeems to apply very hard againſt the priſoner; he tells you further, that, the moment he felt his purſe moving in his pocket, he inſtantly took his hand from that part which was over his purſe, and caught hold of the wriſt of ſomebody that was near his breeches-pocket; that ſomebody, whoever it was, to be ſure, in point of probability, does appear the moſt likely perſon to whom we could attribute it; he kept hold of the hand, and turned round, and with his other hand he ſeized on the perſon to whom the hand belonged, which proved to be the priſoner at the bar: theſe, gentlemen, to be ſure, are ſtrong circumſtances; it has been imputed to Mr. Le Meſurier, that he had, at the time he went to Bow-ſtreet-office, ſaid, when he was told he muſt go to the office, It is to no purpoſe for me to go to the office, I know nothing about it; but he poſitively denies that he held any ſuch language; he ſays, as near as he can gueſs, what he ſaid was this, that he ſeized a perſon's hand near his pocket, which appeared to be the priſoner's, and therefore he believed him to be the perſon. Therefore, gentlemen, it is for you, on the whole of this evidence, to conſider whether the priſoner is, or is not, guilty of the crime that is now imputed to him: as to any general knowledge you may have of the priſoner, or of his character, that *you are to* lay totally out of the caſe on the preſent occaſion; for every cauſe muſt be tried by its own



own circumſtances; therefore you are to conſider now only of the particular evidence, and how it muſt apply. Now, if you believe the account given by the proſecutor, that at the time the purſe moved in his pocket, he immediately took hold of the priſoner's hand cloſe by his breeches-pocket; and more particularly, if you believe that the priſoner was ſtanding behind him at the time with his hand near his pocket, I am ſorry to ſay it does amount to very ſtrong circumſtantial proof, in regard to the priſoner's being guilty of the fact: there has been no evidence called to contradict the account that he has given. Gentlemen, it is your duty to conſider on the whole evidence; if you are ſatisfied that the priſoner is not guilty of the crime, then certainly you ought to acquit him; but if, from all the circumſtances laid together, you think they do ſo ſtrongly apply to the priſoner, that he is guilty; in that caſe you will find him ſo. Gentlemen, there is one thing that I ought to inform you of; indeed, it was given up by the counſel, which is the capital part of the charge, for it was laid to be ſtolen privily from his perſon. Now there have been determinations, that, whenever the perſon is ſenſible of the thing at the time, that that takes off the capital part; therefore the capital part you will acquit him of; but it is ſtill open to the larceny, though the capital part is given up by the counſel on the opening.

Verdict of the Jury. NOT GUILTY.

PETRIE, *v.* BENFIELD.

A rule was obtained to ſhew cauſe why the bill in an action on the bribery-act for 60,000 l. which was filed in the office at the time, but now either loſt or taken off the file, ſhould not be ſupplied by an atteſted copy; the ſame having before been allowed in the caſe of Petrie v. Macpherſon, two years ago.

It was objected againſt the rule, that this was a penal action, that the copy comes from the plaintiff's hand, and is not even atteſted by the attorney who prepared the original.

LORD KENYON, C. J.—It is highly expedient to grant this application; dangerous conſequences might otherwiſe enſue.

BULLER, J.—Great enquiry was made in the caſe of Macpherſon reſpecting the loſs of theſe bills; and there was reaſon to ſuſpect that they had been ſurreptitiouſly taken off the file.

Rule abſolute.

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HANCOCK AND OTHERS, ASSIGNEES OF EDENSOR, A BANKRUPT, *v.* ENTWISLE AND OTHERS.

The bankrupt was a broker, and had purchaſed for the defendants ſome cotton, by which they were conſiderable loſers: in conſequence of which, an agreement was entered into between the defendants and the bankrupts, that he ſhould reimburſe them their loſs, which exceeded the ſum of 1900 l. but which, for the ſake of accommodation, was ſettled at that ſum, and no more; that in payment of this ſum, the bankrupt ſhould from time to time, in the courſe of four years, recommend parcels of cotton to the defendants for their purchaſe: and the bankrupt undertook that the clear profits of ſuch ſale ſhould, in the ſpace of four years, diſcharge the ſaid ſum of 1900 l. but, if the ſame ſhould not be paid in that time, the bankrupt, in caſe he ſhould be living, was to pay the difference.

The queſtion now aroſe upon an action on a bill of exchange, whether the defendants were entitled to a ſet-off upon this agreement. Lord Kenyon, on the trial, was of opinion, that the defendants were not entitled to a ſet-off, and the plaintiffs obtained a verdict.

On a rule to ſhew cauſe why a new trial ſhould not be granted,

Law, in ſupport of the rule, was deſired to begin: he contended, that theſe were liquidated damages by the agreement, and therefore not like the caſe of Howlet *v.* Strickland (Cooper 56). The defendants might have proved the 1900 l. under the commiſſion, and may now ſet it off in this action; for it became a debt on the bankruptcy, the party being incapable of performing the contract.

LORD KENYON, C. J.—Without the deed, the defendant's claim could not have been ſet off, becauſe it reſted in damages merely, and muſt have been ſettled by action. But the deed liquidated the damages, and a certain recompence was to be made in the courſe of four years. If a certain ſum of money had been payable by inſtalments, and one of the payments due before the bankruptcy, the whole might have been proved under the commiſſion. But the bankrupt is not diſcharged by his bankruptcy from the deed; for, after his certificate, he may perform the ſtipulations of it. Then if he were not diſcharged by his certificate, this debt could not be proved, nor can it be ſet off; for it *had no exiſtence* as a debt at the time of the bank-



bankruptcy. The diſtinction is, if the demand be payable *at all events*, though at a future day it may be proved; but where it depends on a *contingency* whether it will be paid or not, it cannot be proved, unleſs it be ſecured by a penalty which is *forfeited at law* (Atkins, 115, 116.) But in this caſe there was no legal demand at the time of the bankruptcy.

Rule diſcharged.

BOLDERO AND OTHERS *v.* MOSSE AND OTHERS.

Defendants were arreſted by a *latitat* for 423 l. directed to the Chamberlain of the County Palatine of Lancaſter; but afterwards proceedings were ſtayed on payment of debt and coſts. The Maſter in taxing the bill refuſed to allow a charge of two pounds for each arreſt paid to the Sheriff's officer, one guinea only being the uſual charge in other counties.

The Quarter Seſſions of the county of Lancaſter had ſettled a table of fees in 1767, in which bailiffs were allowed in arreſts for debts from 200 l. to 500 l. 2 l. for each arreſt; and this ſum had been actually paid to the bailiff in the preſent inſtance. The ſeſſions made this table by virtue of the act 32 Geo. II. cap. 28, which orders the Juſtices to regulate the charges for lodging, &c. of perſons under arreſt; and it was urged, that though this clauſe may apply only to expences after arreſt, yet as the table had remained ſo many years, and as the guinea uſually allowed by the Maſter was greater than that fixed by the ſtatute 23 H. VI. they ought to be reimburſed the money *bonâ fide* paid.

BY THE COURT. Motion refuſed. The Seſſions have no authority to fix fees for this court. If bailiffs exact *in future* more than the uſual ſum, they may be indicted for extortion.

JOHN PARSLOW, ESQ.; *againſt* FRANCIS SYKES, ESQ.

Counſel for Plaintiff, Mr. Erſkine and Mr. Shepherd. For Defendant, Mr. Bearcroft.

Mr. Erſkine on the part of the plaintiff began thus.—Gentlemen of the Jury, the plaintiff is an officer in one of the regiments of the King's dragoons, a gentleman of ſlender fortune. The defendant, Mr. Sykes, is an officer of the ſame regiment, the only ſon of Sir Francis Sykes, Bart.

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a gentleman who has acquired great wealth in India. The plaintiff and defendant had become acquainted with each other in conſequence of their being together in the ſervice, and as brother officers their friendſhip began. They were both officers in the army; and as officers it was natural to expect in them that natural gallantry which diſtinguiſhes the character of military life, which to the honour of that moſt honourable profeſſion he was happy to ſay, and he took this favourable opportunity to do ſo, having once been of that claſs himſelf, that ſpeaking in general terms, the gallantry of officers to the fair ſex was not more diſtinguiſhable than that heroic gallantry which has ſo well and ſo laudably been employed in the ſervice of their country, and the ſtate. The defendant, however, as far as his character could be involved in the deſcription, formed a complete and ſtriking contraſt of the officer, the man of honour, and of all that is to be expected of a man of openneſs, candour, and integrity; for inſtead of that manlineſs of ſpirit, and unwillingneſs to trifle with the happineſs of others, he had diſcovered himſelf to be of ſo ſelfiſh a diſpoſition, that he was ready to ſacrifice all the comforts of his deareſt friend to the gratification of his own deſires. All the civilities which a man of polite life could poſſibly expect, or receive from another, were experienced by the defendant from the plaintiff: they were brother officers, and thoſe offices of friendſhip which that condition of life particularly affords were not omitted by the plaintiff; ſorry am I to ſay, that the defendant made ſo bad, ſo ungenerous, and ſo unprincipled an uſe of theſe advantages, that at the moment he received them, he expreſſed himſelf in terms of the moſt ſhocking brutality againſt him; for he had not been of the meſs with Mr. Parſlow three weeks, before he formed a reſolution to diſhonour that man, whom, by all the laws of humanity, he ought to reverence; he had ſeen the plaintiff's wife, who was a virtuous, beautiful, and accompliſhed woman; he formed a ſyſtem of ſeduction, and ſaid, in the preſence of officers of the meſs, "I ſhould like to debauch that woman;" this, when compared with his ſubſequent conduct, would explain the extreme depravity of his heart.

The plaintiff, ignorant of this deſign, interchanged viſits and civilities, and lived in habits of the moſt friendly intimacy with the defendant, without having the moſt diſtant ſuſpicion that any diſhonourable intentions were harboured in Mr. Sykes's mind, for he deported himſelf with ſo much decorum, decency, and reſpect to Mrs. Parſlow, and ſo much apparent friendſhip for her huſband, that it was

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impoſſible to entertain ſuſpicions. The conduct of Mr. Parſlow towards his wife was founded in indulgence and love. She viſited her relations and her friends; he did not think of keeping her aloof from ſociety, for he had no ſuſpicion that ſhe was expoſed to temptation. He was tender and affectionate, but he did not ſhew that affection by locking his wife up like a Spaniard.

The ladies who kept company with Mrs. Parſlow, the officers who viſited the family, (characters by no means deficient in penetration), never entertained the leaſt particle of doubt of the honour of Mrs. Parſlow, and of the ſincere friendſhip of Mr. Sykes towards her huſband. Thus ſituated, the plaintiff little thought, that under this maſk of friendſhip, Mr. Sykes was ſupplanting him in the affections of his wife; it was true that Mr. Sykes and Mrs. Parſlow were often together, but nothing happened, or in the moſt remote degree tranſpired, which could induce any human being to ſuſpect the intentions of Mr. Sykes, nor was a doubt entertained upon the ſubject until the very evening they eloped.

In July laſt, on a Sunday afternoon, Mr. Sykes called, in his phaeton, at Ipſwich, at Mr. Parſlow's houſe, and as Mrs. Parſlow had in the morning expreſſed a deſire to take an airing, it was propoſed that ſhe ſhould ride out in Mr. Sykes's phaeton; to this propoſal Mr. Parſlow aſſented, and ſo little did he ſuſpect what was then intended by Mr. Sykes, that with the utmoſt affection he took his wife by the hand to the carriage in the moſt engaging manner, wiſhed her the advantage and benefit of an airing, and anticipated her ſafe return; little did he think that he ſaw her for the laſt time! Night came on—but ſuch a night—the power of words fail me—torn with anxiety for the fate—fearful of the danger—diſtreſſed and diſtracted for the ſafety—the honour—the virtue—the life of the dear object of his love! he ſuſpected, truſted, hoped, confided—the hour of midnight came, but not the tender partner of his joys—it might be ſaid of him, in the language of the almoſt-inſpired poet—

"But, O what damned minutes tells he o'er,
"Who doats, yet doubts; ſuſpects, yet ſtrongly loves!"

When he was afterwards informed that his wife was ſeen in the carriage with Mr. Sykes many miles off, and driving with great rapidity towards London, yet even this would not entirely extinguiſh the flame of his love; he determined to follow his wife; but the artifice of Mr. Sykes eluded the vigilance of Mr. Parſlow and Mr. Wallace, who bore him company. Mr. Parſlow now finding that his affection was be-

betrayed, and bed dishonoured, did not follow Mr. Sykes, as the first impulse of anger had directed; he did not seek revenge in the manner which, perhaps, the blunt sensations of honest nature might dictate; he did not seek the life of the man who, under the mask of friendship, had been the foulest and the meanest enemy; he did not chuse to be the avenger of his own wrong, he came to a jury of his country, he came to twelve honest men and laid his case before them; he calls not for reparation, for that is beyond the power of an earthly tribunal to measure; he calls for that sort of attention to his case, which the law enables jurymen to bestow.

I shall shew you, gentlemen, by the evidence, that the defendant practised a deliberate scheme and system of seduction; that the reserve and respect which he always observed towards Mrs. Parslow, was nothing but well-acted hypocrisy. He cannot plead those causes which, unhappily for human-nature, are sometimes irresistible, and unavoidable in their effects; he cannot plead the impulse of a momentary passion; he cannot plead the combination of those circumstances, and the importunity of appetite under the influence of their union, which sometimes defy and baffle the most determined and well-regulated principles of morality; he cannot say that he was suddenly driven off the poise of reason, suddenly assaulted and subdued by the effect of enchanting beauty: No! his was a cold, deliberate, unfeeling infamy; he was methodically mischievous, a seducer by system; his guilt was such as the jury could better feel than the advocate describe; on the feelings of the jury, therefore, we must draw for the deficiency of expression!

There is every reason to believe, that but for the intrusion of this defendant, many children would have blessed the parents, and adorned the family—Children, at once the care and happy fruits of the nuptial bed—Children, whose blooming aspect give vigour to declining age, and whose engaging manners sweeten the most bitter drops of the cup of affliction!—It is for them we toil and endure the hardships of the roughest life!—It is for them we labour beyond the period at which it is natural to seek repose in retired life! It is for them the female beauty fades without regret, and contemplates her own decay, while, smiling, she views her beauty, commencing, in her daughter, a blooming and a new life! These are the consolations of declining age, and without them the most splendid ornaments of life avail us nothing—These he has lost for ever.

Compensation, gentlemen, in this case is out of all question; double the *damages here* laid are nothing when op-

poſed to the injury which the plaintiff has ſuſtained. But, you will remember, you are cloathed with power, and as citizens you are armed with duty, to uſe all your offices in ſupport of the injured plaintiff; a man, who had ſuſtained upon his mind a load too much for human fortitude to bear, and upon the honour of his family a ſtain that can never be eraſed.

Evidence for the Plaintiff.

The marriage proved, in May 1785.

Captain Williams. I was abroad with Mr. and Mrs. Parſlow. I always underſtood them to be a happy pair. Mr. Parſlow behaved with the utmoſt tenderneſs and affection to his wife.

Three weeks after he joined the regiment, he ſaid in my preſence at the meſs, that it would give him great pleaſure to debauch Mrs. Parſlow. Mr. Parſlow was not preſent.

Mrs. Parſlow did not ſhew any levity, or any partiality to Mr. Sykes the defendant.

Nor did any thing paſs to my knowledge, that ought or could alarm the ſuſpicion of Mr. Parſlow.

Mr. Sykes continued to viſit Mr. and Mrs. Parſlow above three months; afterwards went away and again viſited them at Reading, to which place the regiment was removed for a ſhort time, and again removed to Sudbury and continued for one month: at this place there were no lodgings for the ladies, the town being very full; the plaintiff, Mr. Parſlow, was therefore, and on that account, compelled to be abſent a ſhort time from his lady.

Croſs-examined by Mr. Bearcroft.

I rebuked Mr. Sykes for his obſervation at the meſs, but do not recollect that he made any reply; we were both ſober. I thought no more of it, and took no notice of it to Mr. Parſlow, becauſe I was confident it muſt have produced very ſerious conſequences.

Major Callow. I believe Mr. and Mrs. Parſlow lived on terms of the very beſt love and affection. I am married, and Mrs. Parſlow frequently viſited my wife. I never heard or ſuſpected any thing improper reſpecting Mrs. Parſlow; for had there been any doubt of the honour of Mrs. Parſlow, her viſits to the ladies of the regiment would not have been received.

Captain Watſon. The behaviour of Mr. Parſlow to his lady was proper and becoming; indeed, he was exceedingly affectionate; the leaſt doubt was never entertained of the honourable character of Mrs. Parſlow.

Colonel

Colonel Gwynn. I commanded the regiment of which Mr. Parſlow was Captain at Sudbury, where Captain Parſlow's attendance was indiſpenſably requiſite; and the town was ſo full that the ladies could not be accommodated.

Captain Parſlow always ſpoke of his lady with a great deal of feeling and affection.

Mr. Sykes looks more, but is not above one or two and twenty; his manner was very young, particularly at the meſs; his behaviour was not what I always liked.

I ſaw Mrs. Parſlow and Mr. Sykes together in a phaeton at Aſcot races, which I thought an impropriety.

Mr. M'Mahon. I am ſurgeon to the regiment. About three years ago, Mrs. Parſlow's health was indifferent. I adviſed her to go out in an open carriage often, but not to ride on horſeback, becauſe it was too violent an exerciſe; I afterwards adviſed her to try the air of France.

Captain Parſlow was very affectionate and indulgent to his lady; he took her to the Continent according to advice, but when ſhe returned her health was worſe.

I frequently ſaw Mr. Sykes at Mr. Parſlow's, but ſaw no difference in his behaviour to Mrs. Parſlow from that of any other officer who frequently viſited the family; I ſaw no behaviour that could or might alarm a huſband.

Captain Wallace. I have been married to the ſiſter of Mrs. Parſlow about four years, and reſide now at Windſor. Mrs. Parſlow came there on a viſit, and went in my carriage to Aſcot races. I ſaw Mr. Sykes on the race ground in his phaeton. I went upon the ſtand, and left the ladies in my carriage, and after the firſt heat I ſaw a gentleman talking to the ladies; they told me it was Mr. Sykes. I ſaw Mr. Sykes about half an hour afterwards, and Mrs. Parſlow took a view of the amuſement of the race in Mr. Sykes's phaeton. I did not object to it, becauſe Mrs. Parſlow told me Mr. Sykes was the particular friend and brother officer of her huſband; ſhe then returned to my carriage to her ſiſter, and went home.

I ſaw Mr. and Mrs. Parſlow at Ipſwich together loving and affectionate as uſual. Mr. Sykes at this time viſited Mr. and Mrs. Parſlow frequently, and continued to do ſo until the time that he carried her off, which was eight days afterwards.

At no one time in my knowledge did Mrs. Parſlow and Mr. Sykes go out together—nor was their behaviour ſo particular as to excite the leaſt ſuſpicion.



Mr. Parſlow behaved to his lady with the utmoſt affection and tenderneſs of a huſband; and ſhe behaved exceſſively well; even on the very day on which the elopement happened, not the leaſt ſuſpicion had been entertained.

On the Sunday of the elopement, Mr. Sykes came to the houſe of Mr. Parſlow, in the morning; and it was agreed, that in the afternoon he ſhould call with his phaeton to take Mrs. Parſlow out for an airing, ſhe having complained ſhe was not well; ſhe did not appear quite reſtored to health.

Between five and ſix o'clock, Mr. Sykes came in his phaeton, and Mr. Parſlow attended his lady and aſſiſted her into the carriage, and then they drove off. I had not, nor had any other perſon, the leaſt ſuſpicion of what was intended by Mr. Sykes, at leaſt I could not tell that any body ſuſpected; I had no ſuſpicion till ten at night; I then began to ſuſpect, as they did not return; and at this time Captain Parſlow appeared very unhappy; I never ſaw a man more unhappy, diſtreſſed, and agitated in my life; he appeared the whole of the next day quite diſtracted, and incapable of knowing what to do; but on the Tueſday he became able to liſten to advice: and then Captain Parſlow and myſelf ſet off for London, in purſuit of Mrs. Parſlow and Mr. Sykes, but could not come up with them.

Before this, I believed Mr. and Mrs. Parſlow to be the happieſt couple in the world; they had a beautiful child of four years of age.

Mr. Sykes had ſome converſation with Mrs. Parſlow the day of the elopement; but nothing was perceived which conveyed the leaſt ſuſpicion.

Captain Pye. I ſaw Mrs. Parſlow and Mr. Sykes on the day of the elopement—ſaw them in the duſk in a phaeton, on the road about twelve miles from Ipſwich; I went up and ſpoke to them, and they appeared confuſed; Mrs. Parſlow aſked how far it was to Ipſwich; I anſwered, about twelve miles; ſhe then ſaid to Mr. Sykes, "Turn round "and go home as ſoon as you can;" to which he anſwered, "That he would turn in the town," and then drove on.

Margaret Kemp. I am chambermaid of the George inn at Thetford; July 19, at a quarter paſt twelve at night, Mr. Sykes and Mrs. Parſlow came to the inn; the lady ordered a room to be got ready, which was immediately done: the lady went into bed, and ordered me to inform the gentleman that ſhe was in bed; and the gentleman came up ſtairs into the room, put out the candle, and bid the *chambermaid* call him at nine the next morning.

Lelia

Letitia Fletcher, chambermaid at Oſborne's Hotel in the Adelphi, ſwore, that Mr. Sykes, in July laſt, came to their houſe with a lady, and ſtaid one night—they had two bed-chambers---but---they ſlept in one bed. I ſaw them in bed together.

The Rev. Mr. Methat. I knew the defendant at college; in July laſt I ſaw the defendant at the Mount Coffee-houſe; he aſked if I had heard any news from Ipſwich, and what they ſaid of him; I made no anſwer: then the defendant ſaid, "I met Parſlow and Wallace, and if Par-"flow has any call on me, I am determined to fight him—"I am ready for him. I am come to town with Mrs. "Parſlow---my journey to Ipſwich has anſwered my pur-"poſe; I have got her in Bennet-ſtreet, where I ſhall "be glad to ſee you.---Will you dine with me to-mor-"row?"

This was partly addreſſed to Mr. Methat, and partly, by way of boaſting, to the company in the coffee-room, who were about forty in number; ten at leaſt being at that table.

DEFENCE.

Mr. Bearcroft ſaid, he was ready to confeſs, he was oppreſſed with a caſe which, he was ready to own, called for the ſerious attention of the jury. The oppreſſion was two-fold. The firſt part of it was the picture of eloquence which had been painted in ſuch glowing colours by Mr. Erſkine's eloquence, which, if the ſounds of it had ceaſed to vibrate in the ears of the jury, the effect, he was ſure, ſtill clung to their hearts;---ſecondly, the difficulty of the caſe itſelf, independent of this glowing picture; he ſaid, it was not eloquence alone that had marked the conduct of Mr. Erſkine on this trial; he conducted the cauſe with infinite prudence and conſummate judgment; he had called witneſſes to eſtabliſh his caſe, but did not ſtop here, for he had endeavoured to weaken the defence by anticipating its effect:---in the mode of examining his own witneſſes, he had put to every one of them the queſtion, "Whether Captain Parſlow "was not affectionate and attentive to his wife?" And by all of them, undoubtedly, was anſwered in the affirmative---but Mr. Bearcroft was inſtructed to ſtate, that Mr. Parſlow had been extremely negligent of his wife, not at Sudbury only, but at other places; that he had been guilty of groſs negligence to her, particularly when it was conſidered that ſhe was a woman of ſuch enchanting beauty,

and



and ſurrounded as ſhe was by young officers, and men of gaiety and faſhion; he did not, however, impute to Captain Parſlow any diſhonourable views, ſuch as often happen in caſes of this ſort, of connivance with a view to get rid of a wife of whom the huſband is tired; or a conſpiracy between the huſband and wife, for the purpoſe of bringing an action for large damages; thoſe things, although in actions of this deſcription they often occurred, were not imputed here; all that he was inſtructed to ſtate on the part of the defendant was, that Captain Parſlow had really been guilty of very groſs negligence and inattention to Mrs. Parſlow; this, if proved, muſt conſiderably diminiſh the damages.

To augment the damages, it has been ſaid, if a man cannot pay in his *purſe*, he muſt pay in his *perſon*; he felt himſelf intitled to appeal to the noble and learned judge, whether that doctrine was not ſolely and excluſively applicable to *criminal proceedings*, and not in the leaſt degree to govern the caſe of an *action for damages*; if, therefore, the jury gave great and very high damages, they might be beyond the ability of the defendant to pay, and they might be more than his father ſhall chuſe to advance; the conſequence will be, a perpetual impriſonment of the defendant; this would be in diametrical oppoſition to one of the moſt wiſe maxims of the law of England, "*No "man ſhall be charged with the payment which is beyond his "capacity to pay.*" There was no proof before the jury, that the preſent defendant was worth a guinea; on the contrary, it could be very eaſily proved, that, excluſive of his dependance on his father (which is an uncertain allowance), he is many pounds worſe than being worth nothing!

He ſhould not ſtate that the plaintiff, Mr. Parſlow, had acted criminally; but he was inſtructed to ſtate, that he had acted very improperly, and very indiſcreetly, in ſuffering his beautiful wife to ride with the defendant in a phaeton; nay, he ſhould prove, at leaſt he was ſo inſtructed, that the plaintiff conſtantly allowed his wife to ride out with Mr. Sykes, and that, when ſhe was not attended with any other perſon; that he permitted her to dance with Mr. Sykes at different balls, and other places of public amuſement; conſtantly and invariably appearing careleſs of the conſequences of ſuch blameable negligence and indiſcretion.

Evidence for the Defendant.

Charles Wren. I was ſervant to Mr. Sykes, who came to join the regiment in the year 1788. Mr. Sykes uſed to travel with four horſes in a phaeton; Mrs Parſlow frequently uſed to ride out with him unattended. I frequently carried meſſages from Mrs. Parſlow to Mr. Sykes, that ſhe would ride with him; at other times from Mr. Sykes to Mrs. Parſlow, inviting her to ride.

In the way from Weymouth, Mrs. Parſlow went in her chariot, and Mr. Sykes in his gigg; but from Blandford to Saliſbury they both went in the gigg, and Mr. Parſlow ſaw them going, but did not object. I have ſeen Mr. Sykes at Mrs. Parſlow's, ſo much in liquor, that I have been obliged to lead him home.

That Captain Parſlow ſaid, when Mr. Sykes and Mrs. Parſlow were in the gigg, "there they go, they do very "well."

On his croſs-examination, he ſaid, he rode all the way behind, while Mr. Sykes and Mrs. Parſlow went in the gigg, from Blandford to Saliſbury; and as they were drawn by *hackney horſes*, he could not tell but that it might be to the *horſes* that Mr. Parſlow alluded, when he ſaid, "there "they go, they do very well."

William Broadway. I was ſervant to Mr. Sykes; Mr. Sykes frequently viſited Mrs. Parſlow, at Dorcheſter, and once in particular they were left alone in the parlour; I ſaw them together the night I went to my maſter to aſk whether I ſhould provide horſes to go to Bath the next day Mr. Sykes and Mrs. Parſlow were at that time ſitting together in the dining-room; this was about twelve at night; they were frequently together in this manner---but I ſaw them thus no more than once. I recollect Mrs. Parſlow once coming to Mr. Sykes's lodgings, half an hour before all the officers came; who afterwards ſpent the evening together, and for that half hour Mrs. Parſlow and Mr. Sykes were together. Mr. Sykes frequently uſed to ſend preſents to Mrs. Parſlow; he ſent once a *dozen pair of ſhoes.* By meſſages and compliments, Mrs. Parſlow and Mr. Sykes uſed to ſpend evenings often together; they frequently met in the ſtreets. Mrs. Parſlow and Mr. Sykes went together in Mr. Parſlow's carriage from Weymouth to Dorcheſter: Mr. Parſlow got out of his own chariot, and deſired Mr. Sykes to go into it, and he did ſo with Mrs. Parſlow, while Mr. Parſlow rode in a hackney poſt-chaiſe, *behind and alone.*

Mr.



Mr. Erſkine croſs-examined this witneſs. Mrs. Parſlow had not the appearance of a perſon out of health. Mr. Sykes treated Mrs. Parſlow as his friend. He never ſaw Mr. Sykes and Mrs. Parſlow together more than once in the dining-room; and he would not ſwear that Mr. Parſlow was not in the houſe at that time. Mr. Parſlow generally placed Mr. Sykes at Mrs. Parſlow's ſide, while Mr. Parſlow was at the bottom of his own table.

When Mr. Sykes got into the chariot to Mrs. Parſlow, at the requeſt of Mr. Parſlow, *Mrs. Parſlow's ſiſter was with her.*

Mr. Erſkine, in reply, ſaid, my indignation has been riſing, ſtep by ſtep, from the commencement to the concluſion of this defence; but it has at laſt melted into compaſſion for the defendant; for there is a ſtage of depravity in human-nature, to which nothing but compaſſion is applicable: of that deſcription is the defence ſet up upon the preſent trial; ſo monſtrous, ſo inhuman, ſo much againſt the very ſpirit and eſſence of juſtice, was the conduct of this trial upon the part of the defendant, that it might be ſtated as a caſe which was entirely out of the ordinary courſe of human life; ſuch a complicated ſcene of vice and iniquity has never, perhaps, before exiſted; the defendant no ſooner ſaw the plaintiff's wife, but the reſolution is taken to encompaſs her deſtruction; and this reſolution is not once checked, until the infamous deed is done: he no ſooner looks at the happineſs of his friend in the love, ſociety, and affection of his wife, but he determines to deſtroy it: this beautiful woman becomes inſtantly, not the object of his admiration, but the object of his luſt; at once he determines to violate all the laws of honour, humanity, friendſhip, and nature; he coolly and deliberately ſays to himſelf, "I ſee you are happy; I will deſtroy that happineſs; I ſee you are now the envy of the world for the bliſs you participate from mutual love, but I will make you miſerable, for it is my choice it ſhall be ſo---I look on that child, that beautiful innocent, whom every night I ſee you careſs, as the proof and remembrance of your former endearments, and pledge of your future joy; I will change it into a ſerpent, when hereafter you take it to your boſom; that genuine ſource of your virtuous love ſhall become your curſe, and not your conſolation." This did he ſpeak to himſelf when firſt he meditated this unparalleled miſchief; this was evident from the whole tenour of the defence, which, indeed, was not according to the advice of the counſel for the defendant;

his good ſenſe induced him to hint and allude to, rather than ſeem to make, a regular defence; he was, from his great experience, well aware of the effect of ſuch a mode of defending a caſe of this extraordinary nature; and notwithſtanding the great diſcretion and extraordinary abilities of Mr. Bearcroft, they were altogether unable to hide the infamy of the defendant's caſe. His *own domeſtics* are brought to defend him through his career of infamy. After the moſt grievous injury that can poſſibly be done to man, it is to be entirely forgotten, becauſe the delinquent's menial ſervants approve of the conduct of their maſter; the adulterer looks around to his dependants, bids them try if they can ſee any negligence in the huſband, or ſuch as may appear to them to be negligence and inattention to his wife. Good God!---are we in England! in the face of magiſtracy! in a country where every man is intitled to freedom and protection! in a land where morality, honour, and religion are revered!—Or in a deſert, inhabited by wild beaſts and ſavages, where no rights are acknowledged and poſſeſſed, but thoſe derived from ſtrength and cunning!---According to this defence, every man in England muſt not only lock up his wife like a Spaniard, but he muſt alſo keep a journal of the minutes of his own life, or elſe the adulterer will excuſe himſelf, by thus proving the negligence of the injured huſband.

With reſpect to the principle upon which Mr. Bearcroft had contended, that no man ought to be charged with a ſum which was beyond his power or ability to pay; I anſwer, that the extreme infamy of the defendant's caſe entitles him to no favour, and there is a probability he will ſome time be able, if not at preſent.

It ſhould not be forgot, that the defendant had at laſt become ſenſible of the injury which he had done, and offered certainly to make a complete compenſation, he had offered to *cut the plaintiff's throat!* he had offered to add murder to adultery! but this was kind and relenting, for as he knew that the plaintiff muſt be miſerable while he remained on earth, he offered to ſend him to a happier ſtate.

I entreat you, gentlemen, to reflect on the plaintiff's ſituation, and that of his unprotected and deſerted child. How can he look upon this lovely infant without the keeneſt anguiſh! How can he behold its lovely face without the moſt mournful throbs of heart-felt ſorrow, while it exhibits to his mind the memory of the once-loved mother, whoſe endearments produced it! How can he

rear



rear this tender plant, and daily behold it, without exclaiming, O mayſt thou always preſerve the virtue which thy mother once poſſeſſed! Mayſt thou have her enchanting and lovely beauty, but God protect thee from her fate!

CHARGE.

Lord KENYON obſerved to the jury, from the attention they had paid to this cauſe, he was ſure the material points were deeply impreſſed upon their minds.

This was a cauſe which called for the moſt ſerious attention of the jury, not from any difficulty they would meet in its diſcuſſion, but on account of the enormous conduct that had been imputed to the defendant, and alſo on account of the very great and heavy injury of which the plaintiff complained, and for which he ſought juſtice in their verdict.

Two queſtions, his lordſhip ſaid, preſented themſelves to the jury——Whether the fact of which the plaintiff complained was proved.——And, if proved, what damages he was entitled to receive.

The adultery beyond all doubt was proved: the ſeduction was proved by clear and preciſe evidence; they would therefore naturally turn to the ſecond conſideration, namely, the amount of the damages which ſhould be given to the plaintiff.

Cauſes of this nature had great variety of diſtinction. Inſtances there were, where the adultery was clearly proved, and yet the plaintiff was entitled to ſmall or no damages: where it appears that the huſband himſelf takes part in the ſeduction, he ſhall not be entitled to any damages ——Where (as one may ſay) he puts his wife in bed with the adulterer, and himſelf places the pillow under their heads, the law will ſay, "You have received no "injury by that act to which you have conſented, and "therefore no attention ſhall be paid to your complaint." Guilt, in a moral view, certainly muſt always attend adultery; but if the huſband conſents to it, he ſhall not be permitted by the law to complain.

Another caſe is; where a huſband has wilfully neglected his wife, has been careleſsly and ſhamefully inattentive to her, he ſhall not recover damages to a large amount, becauſe he is in a great degree the cauſe of the moral tranſgreſſion. The jury, in the preſent caſe, ſhould attentively conſider, whether there had been a trap laid by the plaintiff

tiff to catch the defendant; and alſo, whether the plaintiff had been inattentive and negligent towards his wife; in theſe conſiderations, nothing but the evidence could fairly lead the jury to a determination. His lordſhip ſaid, that this was the province of the jury, they were to find out the merits of the defendant's cauſe; as to himſelf, he confeſſed, that he did not ſee that the defence diſcloſed circumſtances which could poſſibly, in fair reaſon, operate in his favour. What was the defendant's caſe? He comes into the regiment very uninformed, as appeared by unqueſtionable evidence, and young. He comes as a brother officer into the company of the plaintiff, a gentleman into whoſe family he is introduced and received, and it might have been of great advantage to the defendant to have had the friendſhip of ſuch an officer. The defendant, inſtead of making a proper uſe of this advantage, diſgraces himſelf by purpoſing almoſt immediately to abuſe it; for he had not joined the regiment a fortnight, before he is heard to utter the moſt deteſtable ſentiment; he has the hardened wickedneſs to ſay of a lady, whom it was his duty to reſpect as his friend's wife---"It would give me great pleaſure to debauch that lady."

He conſtantly partook of that hoſpitality, which, it ſeems diſtinguiſhed Captain Parſlow's houſe; thither he is permitted to repair when he has no other employment for his time; and which, as it ultimately appears, he employs in the deſtruction of the happineſs of his friend; he follows Captain Parſlow to Ipſwich, where he puts in practice what he had before ſaid he wiſhed to do; he then comes to London, and in an open Coffee-room has the audacity to boaſt of his conduct inſtead of being covered with ſhame and confuſion for his guilt; and then ſays, he is ready to fight the plaintiff; ſo that if the plaintiff is not contented to be ſilent about the injury, *his throat is to be cut*. This part of the defendant's conduct went a great way to aſſiſt the jury in their determination upon this caſe, becauſe it ſhewed that the defendant was well aware, that he ran away with the lady againſt the conſent of the plaintiff.

Courts of juſtice in this country did not exhibit on their records a caſe more aggravated than this. The defendant had diſcovered that he had long meditated this ſcheme; that he went to Ipſwich with a deliberated and fixed purpoſe to commit it, and afterwards gloried in the completion of it, and the crime of adultery might have been followed up by the crime of murder. If any thing could



could aggravate this, it is, that the plaintiff, after being deprived of all domeſtic happineſs, and after being compelled to drag the defendant into a court of juſtice, is to have an attempt made to add to the injury, by an endeavour, on the part of the defendant, to ſtain his honour, by endeavouring to ſhew, that the plaintiff in this cauſe was the guilty perſon---that he had laid a trap to catch the defendant, to procure large and inflamed damages.

His lordſhip ſaid, the jury, in their ſober diſcretion, are the only perſons who have a right to govern entirely all conſiderations of damages; and they would not run wild in aſſeſſing (although in this caſe, that was not very eaſy) the damages, and allow their paſſions to ſubdue their judgment; but if large damages are not given, the jury would fall ſhort of that juſtice which they owed to their country. They ſtand in a double capacity; they are as much the guardians and protectors of virtue, as they are the puniſhers of vice; and he was ſure their own good ſenſe would guide and direct them to do juſtice between the parties.

Verdict for the plaintiff. Damages 10,000l.

Trial of JOHN STOCKDALE *for a Libel againſt the* HOUSE *of* COMMONS, *before Lord* KENYON, *in the Court of King's Bench.*

The information charges that he (John Stockdale), being a ſeditious and ill-diſpoſed perſon, did publiſh in a pamphlet, intituled, *A Review of the principal Charges againſt Warren Haſtings, late Governor General of Bengal*, a certain falſe and malicious libel concerning the Impeachment of Warren Haſtings, and concerning the Commons of Great Britain in Parliament aſſembled.

The ſeveral offenſive paſſages are then ſet forth; but, as they are repeated in Mr. *Erſkine's argument, we do not recite them here.*

Mr. ATTORNEY GENERAL *addreſſed the court and jury in an elegant and moſt candid ſpeech, in which he explained the motives of the proſecution, and then ſaid,* The offence which I impute to the defendant, is that of calumniating the Houſe of Commons, not in its ordinary legiſlative capacity, but when acting in its accuſatorial capacity, conceiving it to be their duty on adequate occaſions to inveſtigate the conduct *of perſons in* high ſtations, and to leave their conduct to be

be judged of by the proper conſtitutional tribunal, the Peers in Parliament aſſembled.

After due inveſtigation, the Commons of Great Britain thought it their duty, as is well known, to ſubmit the conduct of a ſervant of this country, who governed one of its moſt opulent dependencies for many years, to an enquiry before that tribunal. One ſhould have thought, that every good ſubject of this country would have forborn imputing to the Houſe of Commons motives utterly unworthy of them, and of thoſe whom they repreſent; inſtead of this, to ſo great a degree now has the licentiouſneſs of the preſs ariſen, that motives the moſt unbecoming that can actuate even any individual, who may be concerned in the proſecution of public juſtice, are imputed to the Repreſentatives of the people of this country in a body; no credit is given to them for meaning to do juſtice to their country, but, on the contrary, private, perſonal, and malicious motives are imputed to the Commons of Great Britain.

When ſuch an imputation is made upon the very firſt Tribunal that this country knows, namely, the Inqueſt of the Nation, the Commons in Parliament aſſembled, carrying any ſubject, who they may think has offended, to the bar of the houſe of lords——I am ſure you will think this an attack ſo dangerous to every Tribunal, ſo dangerous to the whole adminiſtration of juſtice, that if it be well proved, you cannot fail to give it your ſtigma, by a verdict againſt the defendant.

The Attorney General here read the libellous paſſages charged in the information (vid. p. 49 ſeq.) *and then concluded thus:*

I do not chuſe to waſte your time, and that of my Lord, in ſo plain a caſe, with much obſervation; but, hacknied as it may be, it is my duty, upon every one of theſe occaſions, to remind you, gentlemen, that the ſecurity of the preſs conſiſts in its good regulation—if it is meant that it ſhould be preſerved with benefit to the public, it muſt be from time to time lopped of its exceſſes, by reaſonable and proper verdicts of juries, in fit and clear caſes.

EVIDENCE *for the* PROSECUTION.

The Solicitor of the Treaſury proved, from the Journals of Parliament, that there was an impeachment, &c.

William Gotobed produced the pamphlet, and ſaid, he bought it at Mr. Stockdale's ſhop; a boy ſerved him with it.



it. Mr. Stockdale was in the ſhop, and the boy acted as his ſervant.

This was the whole evidence for the proſecution; *and* Mr. Erſkine, *counſel for the defendant, thus addreſſed the jury in his*

DEFENCE.

Gentlemen of the Jury,

Mr. Stockdale, who is brought as a criminal before you for the publication of this book, has, by employing me as his advocate, repoſed what muſt appear to many an extraordinary degree of confidence; ſince, although he well knows that I am perſonally connected in friendſhip with moſt of thoſe whoſe conduct and opinions are principally arraigned by its author, he nevertheleſs commits to my hands his defence and juſtification.

A truſt apparently ſo delicate and ſingular, vanity is but too apt to whiſper an application of to ſome fancied merit of one's own; but it is proper, for the honour of the Engliſh Bar, that the world ſhould know ſuch things happen to all of us daily, and of courſe; and that the defendant, without any ſort of knowledge of me, or any confidence that was perſonal, was only not afraid to follow up an accidental retainer, from the knowledge he has of the general character of the profeſſion.

Happy indeed is it for this country that, whatever intereſted diviſions may characterize other places of which I may have occaſion to ſpeak to day, however the Councils of the higheſt departments of the ſtate may be occaſionally diſtracted by perſonal conſiderations, they never enter theſe walls, to diſturb the adminiſtration of juſtice: Whatever may be our public principles, or the private habits of our lives, they never caſt even a ſhade acroſs the path of our profeſſional duties.

If this be the characteriſtic even of the Bar of an Engliſh Court of Juſtice, what ſacred impartiality may not every man expect from its Jurors and its Bench?

As, from the indulgence which the Court was yeſterday pleaſed to give to my indiſpoſition, this information was not proceeded on when you were attending to try it, it is probable you were not altogether inattentive to what paſſed on the trial of the other indictment, proſecuted alſo by the Houſe of Commons; and therefore, without a re-ſtatement of the ſame principles, and a ſimilar quotation of authorities to ſupport them, I need only remind you of the law appli-

applicable to this ſubject, as it was then admitted by the Attorney General, in conceſſion to my propoſitions, and confirmed by the higher authority of the Court, viz.

Firſt, that every information or indictment muſt contain ſuch a deſcription of the crime, that the defendant may know what crime it is which he is called upon to anſwer.

Secondly, that the Jury may appear to be warranted in their concluſion of guilty or not guilty.

And, laſtly, that the Court may ſee ſuch a preciſe and definite tranſgreſſion upon the record, as to be able to apply the puniſhment which judicial diſcretion may dictate, or which poſitive law may inflict.

It was admitted alſo to follow as a mere corollary from theſe propoſitions, that where an information charges a writing to be compoſed or publiſhed of and concerning the Commons of Great Britain, with an intent to bring that body into ſcandal and diſgrace with the public, the author cannot be brought within the ſcope of ſuch a charge, unleſs the Jury, on examination and compariſon of the whole matter written or publiſhed, ſhall be ſatisfied that the particular paſſages charged as criminal when explained by the context, and conſidered as part of one entire work, were meant and intended by the author to vilify the Houſe of Commons as a body, and were written of and concerning them in Parliament aſſembled.

Theſe principles being ſettled, we are now to ſee what the preſent information is.

It charges, that the defendant, 'unlawfully, wickedly, 'and maliciouſly deviſing, contriving, and intending to 'aſperſe, ſcandalize, and vilify the Commons of Great 'Britain in Parliament aſſembled; and moſt wickedly 'and audaciouſly to repreſent their proceedings as corrupt 'and unjuſt, and to make it believed and thought, as if 'the Commons of Great Britain in Parliament aſſembled 'were a moſt wicked, tyrannical, baſe, and corrupt ſet of 'perſons, and to bring them into diſgrace with the public—' The defendant publiſhed—*What?*---*Not* thoſe latter ends of ſentences, which the Attorney General has read from his brief, as if they had followed one another in order in this book;---*Not* thoſe ſcraps and tails of paſſages which are patched together upon this record, and pronounced in one breath, as if they exiſted without intermediate matter in the ſame page, and without context any where.---*No*---This is not the accuſation, even mutilated as it is. For the information charges, *that with intention to vilify the Houſe of*

Commons,



Commons, the defendant published the whole book, describing it on the record by its title:

" A Review of the Principal Charges againſt Warren " Haſtings, Eſq. late Governor General of Bengal;"

In which amongſt other things, the matter particularly ſelected is to be found. Your enquiry therefore is not confined to, Whether the defendant publiſhed *thoſe ſelected parts of it*; and whether, looking at them as they are diſtorted by the information, they carry in fair conſtruction the ſenſe and meaning which the innuendos put upon them; but whether the author of the *entire work*, I ſay the author, ſince, if he could defend himſelf, the publiſher unqueſtionably can—whether the author wrote the volume which I hold in my hand, as a free, manly, *bona fide* diſquiſition of criminal charges againſt his fellow citizen: or whether the long eloquent diſcuſſion of them, which fills ſo many pages, was a mere cloak and cover for the introduction of the ſuppoſed ſcandal imputed *to the ſelected paſſages*; the mind of the writer all along being intent on traducing the Houſe of Commons, and not on fairly anſwering their charges againſt Mr. Haſtings.

This, gentlemen, is the principal matter for your conſideration; and therefore, if after you ſhall have taken the book itſelf into the chamber which will be provided for you, and read the whole of it with impartial attention;---if, after the performance of this duty, you can return here, and with clear conſciences pronounce upon your oaths, that the impreſſion made upon you by theſe pages is, that the author wrote them with the wicked, ſeditious, and corrupt intentions, charged by the information; you have then my full permiſſion to find the defendant guilty. But if, on the other hand, the general tenor of the compoſition ſhall impreſs you with reſpect for the author, and point him out to you as a man miſtaken perhaps himſelf, but not ſeeking to deceive others:---if every line of the work ſhall preſent to you an intelligent animated mind, glowing with a Chriſtian compaſſion towards a fellow-man, whom he believes to be innocent, and with a patriot zeal for the liberty of his country, which he conſidered as wounded through the ſides of an oppreſſed fellow-citizen; if this ſhall be the impreſſion on your conſciences and underſtandings, when you are called upon to deliver your verdict; then hear from me, that you not only work private injuſtice, but break up the preſs of England, and ſurrender her rights and liberties *for ever*, if you convict him.

Gentlemen,

Gentlemen, to enable you to form a true judgment of the meaning of this book, and of the intention of its author, and to expoſe the miſerable juggle that is played off in the information, by the combination of ſentences, which in the work itſelf have no bearing upon one another—I will firſt give you the publication as it is charged upon the record, and preſented by the Attorney General in opening the caſe for the Crown; and I will then, by reading the interjacent matter, which is ſtudiouſly kept out of ſight, convince you of its true interpretation. The information, beginning with the firſt page of the book, charges, as a libel upon the Houſe of Commons, the following ſentence:

"The Houſe of Commons has now given its final deciſion "with regard to the merits and demerits of Mr. Haſ- "tings. The Grand Inqueſt of England have delivered "their charges, and preferred their impeachment; their "allegations are referred to proof; and from the appeal "to the collective wiſdom and juſtice of the nation in "the ſupreme tribunal of the kingdom, the queſtion "comes to be determined, whether Mr. Haſtings *be* "*guilty or not guilty?*"

It is but fair, however, to admit, that this firſt ſentence which the moſt ingenious malice cannot torture into a criminal conſtruction, is charged by the information rather as introductory to what is made to follow it, than as libellous in itſelf; for the Attorney General, from this introductory paſſage in the firſt page, goes on at a leap to page *thirteenth*, and reads almoſt without a ſtop, as if it immediately followed the other,

"What credit can we give to multiplied and accumulated "charges, when we find that they originate from miſ- "repreſentation and falſehood?"

From theſe two paſſages thus ſtanding together, *without the intervenient matter which occupies thirteen pages*, one would imagine that, inſtead of inveſtigating the probability or improbability of the guilt imputed to Mr. Haſtings; inſtead of carefully examining the charges of the Commons, and the defence of them which had been delivered before them or which was preparing for the Lords: the author immediately, and in a moment after ſtating the mere fact of the impeachment, had decided that the act of the Commons originated from miſrepreſentation and falſehood.

Gentlemen, in the ſame manner a veil is caſt over all that is written *in the next ſeven pages:* For knowing that the con-



text would help to the true conſtruction, not only of the paſſages charged before, but of thoſe in the ſequel of this information; the Attorney General, aware that it would convince every man who read it that there was no intention in the author to calumniate the Houſe of Commons, paſſes over by another leap *to page twenty*; and in the ſame manner, without drawing his breath, and as if it directly followed the two former ſentences *in the 1ſt and 13th pages*, reads from page 20th---

" An impeachment of error in judgment with regard to the
" quantum of a fine, and for an intention that never was
" executed, and never known to the offending party,
" characteriſes a tribunal of inquiſition rather than a
" Court of Parliament."

From this paſſage, by another vault, he leaps over *one-and-thirty pages more, to page fifty-one*; where he reads the following ſentence, which he mainly relies on, and upon which I ſhall by-and-by trouble you with ſome obſervations.

" Thirteen of them paſſed in the Houſe of Commons, not
" only without inveſtigation, but without being read;
" and the votes were given without enquiry, argument,
" or conviction. A majority had determined to im-
" peach; oppoſite parties met each other, and *juſtled in*
" *the dark*, to perplex the political drama, and bring the
" hero to a tragic cataſtrophe."

From thence, deriving new vigour from every exertion, he makes his laſt grand ſtride *over forty four pages*, almoſt to the end of the book, charging a ſentence *in the ninety-fifth page*.

So that out of a volume of *one hundred and ten pages*, the defendant is only charged with a few ſcattered fragments of ſentences picked out of *three or four*. Out of a work, conſiſting of about *two thouſand five hundred and thirty lines*, of manly ſpirited eloquence, *only forty or fifty lines* are culled from different parts of it, and artfully put together, ſo as to rear up a libel out of a falſe context by a ſuppoſed connexion of ſentences with one another, which are not only entirely independent, but which, when compared with their antecedents, bear a totally different conſtruction.

In this manner the greateſt works upon government, the moſt excellent books of ſcience, the ſacred ſcriptures themſelves, might be diſtorted into libels; by forſaking the general

general context, and hanging a meaning upon ſelected parts: ——Thus, as in the text put by Algernon Sidney,

"The fool has ſaid in his heart there is no God;"

The Attorney General on the principle of the preſent proceeding againſt this pamphlet, might indict the publiſher of the Bible for blaſphemouſly denying the exiſtence of heaven, in printing

"*There is no God.*"

For theſe words alone, without the context, would be ſelected by the information; and the Bible, like this book, would be *underſcored* to meet it. Nor could the defendant in ſuch a caſe have any poſſible defence, unleſs the Jury were permitted to ſee, by the book itſelf, that the verſe, inſtead of denying the exiſtence of the Divinity, only imputed that imagination to a fool.

Gentlemen, having now gone through the Attorney General's reading, the book ſhall preſently come forward and ſpeak for itſelf.

But before I can venture to lay it before you, it is proper to call your attention to how matters ſtood at the time of its publication; without which the author's meaning and intention cannot poſſibly be underſtood.

The Commons of Great Britain in Parliament aſſembled had accuſed Mr. Haſtings, as Governor General of Bengal, of high crimes and miſdemeanors; and their juriſdiction for that high purpoſe of national juſtice was unqueſtionably competent. But it is proper you ſhould know the nature of this inquiſitorial capacity.——The Commons, in voting an impeachment, may be compared to a Grand Jury finding a bill of indictment for the Crown: neither the one nor the other can be ſuppoſed to proceed, but upon the matter which is brought before them; neither of them can find guilt without accuſation, nor the truth of accuſation without evidence.

When, therefore, we ſpeak of the *accuſer* or *accuſers* of a perſon indicted for any crime, although the Grand Jury are the accuſers *in form*, by giving effect to the accuſation; yet in common parlance we do not conſider them the reſponſible authors of the proſecution. If I were to write of a moſt wicked indictment, found againſt an innocent man, which was preparing for trial, nobody who read it would conceive I meant to ſtigmatize the Grand Jury that found the bill; but it would be enquired immediately who was the proſecutor, and who were the witneſſes on the back of it.



t. In the ſame manner I mean to contend, that if this book is read with only common attention, the whole ſcope of it will be diſcovered to be this.

That, in the opinion of the author, Mr. Haſtings had been accuſed of malicious adminiſtration in India, from the heat and ſpleen of political diviſions in Parliament, and not from any zeal for national honour or juſtice; that the impeachment did not originate from Government, but from a faction banded againſt it, which, by miſrepreſentation and violence, had faſtened it on an unwilling Houſe of Commons; that, prepoſſeſſed with this ſentiment, (which, however unfounded, makes no part of the preſent buſineſs, ſince the publiſher is not called before you for defaming individual members of the Commons, but for a contempt of the Commons as a body,) the author purſues the charges, article by article;——enters into a warm and animated vindication of Mr. Haſtings, by regular anſwers to each of them; and that, as far as the mind and ſoul of a man can be viſible, I might alſo ſay, embodied in his writings, his intention throughout the whole volume appears to have been to charge with injuſtice the private accuſers of Mr. Haſtings, and not the Houſe of Commons as a body; which undoubtedly rather reluctantly gave way to, than heartily adopted, the impeachment.

This will be found to be the palpable ſcope of the book and no man who can read Engliſh, and who at the ſame time will have the candour and common ſenſe to take his impreſſions from what is written in it, inſtead of bringing his own along with him to the reading of it, can poſſibly underſtand it otherwiſe.

But it may be ſaid, that admitting this to be the ſcope and deſign of the author, what right had he to canvaſs the merits of an accuſation upon the records of the Commons more eſpecially while it was in the courſe of legal proceſs? This, I confeſs, might have been a ſerious queſtion; but the Commons, *as Proſecutors of this information*, ſeem to have waved or forfeited, their right to aſk it.

Before they ſent the Attorney General into this place to puniſh the publication of *anſwers* to their charges, they ſhould have recollected that their own want of circumſpection in the maintenance of their privileges, and the protection of perſons accuſed before them, had given to the public *the charges themſelves*, which ſhould have been confined to their own journals.—The courſe and practice of Parliament might warrant the printing of them for the uſe of their own Members, but there the publication

have ſtopt, and all further progreſs been reſiſted by authority.

If they were reſolved to conſider *anſwers to their charges* as a contempt of their privileges, and to puniſh the publication of them by ſuch ſevere proſecutions, it would have well become them to have begun firſt with thoſe printers who, by publiſhing *the charges themſelves* throughout the whole kingdom, or rather throughout the whole civilized world, were anticipating the paſſions and judgments of the public againſt a ſubject of England upon his trial, ſo as to make the publication *of anſwers* to them, not merely a privilege, but a debt and duty to humanity and juſtice.

The Commons of Great Britain claimed and exerciſed the privileges of queſtioning the innocence of Mr. Haſtings by their impeachment; but as, however queſtioned, it is ſtill to be preſumed and protected, until guilt is eſtabliſhed by judgment, he whom they had accuſed had an equal claim upon their juſtice, to guard him from prejudice and miſrepreſentation until the hour of trial.

Had the Commons, therefore, by the exerciſe of their high, neceſſary, and legal privileges, kept the public aloof from all canvaſs of their proceedings, by an early puniſhment of printers, who, without reſerve or ſecrecy, ſent out *the charges* into the world from a thouſand preſſes in every form of publication, they would have then ſtood upon ground to-day, from whence no argument of policy or juſtice could have removed them; becauſe nothing can be more incompatible with either, than appeals to the many upon ſubjects of judicature, which by common conſent a few are appointed to determine, and which muſt be determined by facts and principles, which the multitude have neither leiſure nor knowledge to inveſtigate. But then let it be remembered, that it is for thoſe who have the authority to accuſe and puniſh, to ſet the example of, and to enforce this reſerve, which is ſo neceſſary for the ends of juſtice.

Courts of Law, therefore, in England never endure the publication of *their* records: and a proſecutor of an indictment would be attached for ſuch a publication; and upon the ſame principle, a defendant would be puniſhed for anticipating the juſtice of his country, by the publication of his defence, the public being no party to it, until the tribunal appointed for its determination be open for its deciſion.

Gentlemen, you have a right to take judicial notice of theſe matters, *without the proof* of them by witneſſes; for

jurors

jurors may not only without evidence found their verdicts on facts that are notorious, but upon what they know privately themſelves, after revealing it upon oath to one another; and therefore you are always to remember, that this book was written when the *Charges* againſt Mr. Haſtings, *to which it is an anſwer*, were, to the knowledge of the Commons, (for we cannot preſume our watchmen to have been aſleep) publicly hawked about in every pamphlet, magazine, and newſpaper in the kingdom.

Gentlemen, you well know with what a curious appetite theſe Charges were devoured by the whole public, intereſting as they were, not only from their importance, but from the merit of their compoſition; certainly not ſo intended by the honourable and excellent compoſer to oppreſs the accuſed, but becauſe the commoneſt ſubjects ſwell into eloquence under the touch of his ſublime genius.

Thus by the remiſſneſs of the Commons *who are now the proſecutors of this information*, a ſubject of England, who was not even charged with contumacious reſiſtance to authority, much leſs a proclaimed outlaw, and therefore fully entitled to every protection which the cuſtoms and ſtatutes of the kingdom hold out for the protection of Britiſh liberty, ſaw himſelf pierced with the arrows of thouſands and ten thouſands of libels.

Gentlemen, before I venture to lay the book before you it muſt be yet further remembered (for the fact is equal notorious), that under theſe unauſpicious circumſtances, the trial of Mr. Haſtings at the bar of the Lords had actually commenced long before its publication.

There the moſt auguſt and ſtriking ſpectacle was diſcloſed, exhibited, which the world in any age of it ever witneſſed. A vaſt ſtage of juſtice was erected, awful from its ſituation, ſplendid from its illuſtrious dignity, venerable from the learning and wiſdom of its judges, captivating and affecting from the mighty concourſe of all ranks and conditions which daily flocked into it, as into a theatre of pleaſure; there, when the whole public mind was awakened and ſoftened to the impreſſion of every human paſſion, there appeared, day after day, one after another of the moſt powerful and exalted talents, eclipſing by accuſing eloquence the moſt boaſted harangues of antiquity, rouſing the pride of national reſentment, by the invectives againſt broken faith, and violated treaties, ſhaking the boſom with alternate pity and horror by the moſt glowing pictures of inſulted nature and human *ſufferance animated* and energetic, from the love of fame

is the inherent paſſion of genius; firm and indefatigable, from a ſtrong prepoſſeſſion of the juſtice of their cauſe.

Gentlemen, when the author ſat down to write the book now before you, all this terrible, unceaſing, exhauſtleſs artillery of warm zeal, matchleſs vigour of underſtanding, conſuming and devouring eloquence, united with the higheſt dignity, was daily, and without proſpect of concluſion, pouring forth upon one private unprotected man, who was bound to hear it, in the face of the whole people of England, with reverential ſubmiſſion and ſilence.

Gentlemen, I do not complain of this as I did of the publication of the Charges; becauſe it is what the law allowed, and ſanctioned in the courſe of a public trial; but when it is remembered that we are not angels, but weak fallible men, and that even the noble Judges of that high tribunal are cloathed beneath their ermines with the common infirmities of man's nature, it will bring us all to a proper temper for conſidering the book itſelf, which will in a few moments be laid before you.

Gentlemen, it was under all theſe circumſtances, and amidſt the blaze of paſſion and prejudice, which the ſcene I have been endeavouring faintly to deſcribe to you might be ſuppoſed likely to produce, that the author, whoſe name I will now give to you, ſat down to compoſe the book which is proſecuted to-day as a libel.

The hiſtory of it is very ſhort and natural.

The Rev. Mr. Loggan, Miniſter of the Goſpel at Leith in Scotland, a clergyman of the pureſt morals, and as you will ſee by-and-by of very ſuperior talents, well acquainted with the human character, and knowing the difficulty of bringing back public opinion after it is ſettled on any ſubject, took a warm, unbought, unſolicited intereſt in the ſituation of Mr. Haſtings, and determined, if poſſible, to arreſt and ſuſpend the public judgment concerning him. He felt for the ſituation of a fellow citizen, expoſed to a trial which, whether right or wrong, is undoubtedly a ſevere one; a trial, certainly not confined to a few criminal acts, like thoſe we are accuſtomed to, but comprehending the tranſactions of a whole life, and the complicated policies of entire nations; a trial, which had neither viſible limits to its duration, bounds to its expence, nor circumſcribed compaſs for the graſp of memory or underſtanding; a trial, which had therefore broke looſe from the common form of deciſion, and had become the univerſal topic of diſcuſſion in the world, ſuperſeding not only every other grave purſuit, but every other *faſhionable diſſipation*.

Gen-



Gentlemen, the queſtion you have therefore to try upon all this matter, is extremely ſimple; it is neither more nor leſs than this: at a time when the charges againſt Mr. Haſtings were, by the implied conſent of the Commons, in every hand, and on every table; when, by their Managers, the lightning of eloquence was inceſſantly conſuming him, and flaſhing in the eyes of the public; when every man was with perfect impunity ſaying, and writing, and publiſhing, juſt what he pleaſed of the ſuppoſed plunderer and devaſtator of nations; would it have been criminal *in Mr. Haſtings himſelf* to have reminded the public that he was a native of this free land, entitled to the common protection of her juſtice, and that he had a defence in his turn to offer to them, the outlines of which he implored them, in the mean time, to receive, as an antidote to the unlimited and unpuniſhed poiſon in circulation againſt him?

Gentlemen, this is, without colour or exaggeration, the true queſtion you are to decide. For I aſſert, without the hazard of contradiction, that if Mr. Haſtings himſelf could have ſtood juſtified or excuſed in your eyes, for publiſhing this volume in his own defence, the author, if he wrote it *bona fide* to defend him, muſt ſtand equally excuſed and juſtified; and if the author be juſtified, the publiſher cannot be criminal, unleſs you had evidence that it was publiſhed by him with a different ſpirit and intention from thoſe in which it was written. The queſtion therefore is correctly what I juſt now ſtated it to be: Could *Mr. Haſtings* have been condemned to infamy for writing this book?

Gentlemen, I tremble with indignation, to be driven to put ſuch a queſtion in England. Shall it be endured, that a ſubject of this country, inſtead of being arraigned and tried for ſome ſingle act in her ordinary courts, where the accuſation, as ſoon at leaſt as it is made public, is followed within a few hours by the deciſion, may be impeached by the Commons for the tranſactions of twenty years, that the accuſation ſhall ſpread as wide, as the region of letters, and the accuſed ſhall ſtand day after day, and year after year, as a ſpectacle before the public, which ſhall be kept in a perpetual ſtate of inflammation againſt him; yet that he ſhall not, without the ſevereſt penalties, be permitted to ſubmit any thing to the judgment of mankind in his defence. If this be law (which it is for you to day to decide), ſuch a man has no trial; that great hall, built by our fathers for Engliſh juſtice, is no longer a

court,

court, but an altar; and an Engliſhman inſtead of being judged in it by GOD AND HIS COUNTRY, is a VICTIM AND A SACRIFICE.—Gentlemen, you will carefully remember, that I am not preſuming to queſtion either the right or the duty of the Commons of Great Britain to impeach; neither am I arraigning the propriety of their ſelecting, as they have done, the moſt extraordinary perſons for ability which the age has produced to manage their impeachment. Much leſs am I cenſuring the Managers themſelves, charged with the conduct of it before the Lords, who were undoubtedly bound by their duty to the Houſe, and to the public, to expatiate upon the crimes of the perſon whom they had accuſed.

None of theſe points are queſtioned by me, nor are in this place queſtionable. I only deſire to have it decided, whether if the Commons, when national expediency happens to call in their judgment for an impeachment, ſhall, inſtead of keeping it on their own records, and carrying it with due ſolemnity to the Peers for trial, permit it without cenſure and puniſhment to be ſold like a common news-paper in the ſhop of my client, ſo crowded with their own Members, that no plain man, without privilege of Parliament, can hope even for a ſight of the fire in a winter's day; every man buying it, reading it, and commenting upon it; the gentleman himſelf who is the object of it, or his friend in his abſence, may not, without ſtepping beyond the bounds of Engliſh freedom, put a copy of what is thus publiſhed into his pocket, and ſend back to the very ſame ſhop for publication a *bona fide*, rational, able anſwer to it, in order that the bane and antidote may circulate together, and the public be kept ſtraight till the day of deciſion.

Gentlemen, if you think that this common duty of ſelf-preſervation in the accuſed himſelf, which Nature writes as a law upon the hearts of even ſavages and brutes, is nevertheleſs too high a privilege to be enjoyed by an impeached and ſuffering Engliſhman; or if you think it beyond the office of humanity and juſtice, when brought home to the hand of a brother or a friend, you will ſay ſo by your verdict of GUILTY—The deciſion will then be *yours*; and the conſolation *mine*, that I laboured to avert it. A very ſmall part of the miſery which will follow from it is likely to light upon *me*; the reſt will be divided amongſt *yourſelves and your children*. Gentlemen, I obſerve plainly, and with infinite ſatisfaction, that you are ſhocked and offended at my even *ſuppoſing* it poſſible you ſhould pronounce



nounce ſuch a deteſtable judgment; and that you only require of me to make out to your ſatisfaction (*as I promiſed*) that the real ſcope and object of this book is a *bona fide* defence of Mr. Haſtings, and *not a cloak and cover for ſcandal on the Houſe of Commons*. Gentlemen, I engage to do this, and I engage for nothing more; I ſhall make an open manly defence. I mean to torture no expreſſions from their natural conſtructions; to diſpute no inuendos on the record, ſhould any of them have a fair application; nor to conceal from your notice any unguarded intemperate expreſſions, which may perhaps be found to chequer the vigorous and animated career of the work. Such a conduct might, by accident, ſhelter the defendant; but it would be the ſurrender of the very principle on which alone the liberty of the Engliſh preſs can ſtand; and I ſhall never defend any man from a temporary impriſonment, by the permanent loſs of my own liberty, and the ruin of my country. I mean therefore to ſubmit to you, that though you ſhould find a few lines in page thirteen, or twenty-one, a few more in page fifty-one, and ſome others in other places, containing expreſſions bearing on the Houſe of Commons, even as a body, which, if written as independent paragraphs by themſelves, would be indefenſible libels; yet that you have a right to paſs them over in judgment, provided the ſubſtance clearly appears to be a *bona fide* concluſion, ariſing from the honeſt inveſtigation of a ſubject which it was lawful to inveſtigate; and the queſtionable expreſſions, the viſible effuſion of a zealous temper, engaged in an honourable and legal purſuit. After this preparation, I am not afraid to lay the book in its genuine ſtate before you.

Here Mr. Erſkine compared, with wonderful ingenuity, the ſeveral paſſages of the book, and endeavoured to ſhew, that the whole work was a bona fide *defence of Mr. Haſtings; and that the terms of obloquy were directed againſt the individual accuſers of him, and not againſt the Houſe of Commons. He then proceeded,*

Here, gentlemen, ſaid he, we muſt be permitted to pauſe together a little; for in examining whether theſe pages were written as an honeſt anſwer to the charges of the Commons, or as a proſtituted defence of a notorious criminal, whom the writer believed to be guilty, *truth becomes material at every ſtep*. For if *in any inſtance* he be detected of a *wilful* miſrepreſentation, he is no longer an object of your attention.

Will the Attorney-General proceed then to detect the *hypocriſy* of our author, by giving us ſome detail of the proofs

proofs by which theſe perſonal enormities have been eſtabliſhed, and which the writer muſt be ſuppoſed to have been acquainted with? I aſk this as the defender of *Mr. Stockdale*, not of Mr. Haſtings, with whom I have no concern. I am ſorry, indeed, to be ſo often obliged to repeat this proteſt; but I really feel myſelf embarraſſed with thoſe repeated coincidences of defence which thicken on me as I advance, and which were, no doubt, overlooked by the Commons when they directed this interlocutory enquiry into his conduct.

I aſk then, *as counſel for Mr. Stockdale*, Whether, when a great ſtate criminal is brought for juſtice at an immenſe expence to the public, accuſed of the moſt oppreſſive cruelties, and charged with the robbery of princes and the deſtruction of nations, it is not open to any one to aſk, Who are his accuſers? What are the ſources and the authorities of theſe ſhocking complaints?—Where are the ambaſſadors or memorials of thoſe princes whoſe revenues he has plundered?—Where are the witneſſes for thoſe unhappy men in whoſe perſons the rights of humanity have been violated?—How deeply buried is the blood of the innocent, that it does not riſe up in retributive judgment to confound the guilty! Theſe ſurely are queſtions, which, when a fellow-citizen is upon a long, painful, and expenſive trial, Humanity has a right to propoſe; which the plain ſenſe of the moſt unlettered man may be expected to dictate, and which all hiſtory muſt provoke from the more enlightened.

When Cicero impeached Verres, before the great tribunal of Rome, of ſimilar cruelties and depredations in *her* provinces, the Roman people were not left to ſuch enquiries. All Sicily ſurrounded the forum, demanding juſtice upon her plunderer and ſpoiler with tears and imprecations. It was not by the eloquence of the *orator*, but by the cries and tears of the miſerable, that Cicero prevailed in that illuſtrious cauſe. Verres fled from the oaths of his accuſers and their witneſſes, and not from the voice of Tully; who, to preſerve the fame of his eloquence, publiſhed the five celebrated ſpeeches which were never delivered againſt the criminal, becauſe he had fled from the city, appalled with the ſight of the perſecuted and the oppreſſed.

It may be ſaid, that the caſes of Sicily and India are widely different; perhaps they may; whether they are or not, is foreign to my purpoſe. I am not bound to deny the



the poſſibility of anſwers to ſuch queſtions; I am only vindicating *the right to aſk them.*

Gentlemen, another paſſage, arraigned by the information, is this:

" An impeachment of *error* in *judgment* with regard to the " *quantum* of a fine, and for an *intention* that never was " *executed*, and never known to the offending party, " characteriſes a tribunal *inquiſition*, rather than a Court " of Parliament."

Gentlemen, I am ready to admit that this ſentiment might have been expreſſed in language more reſerved and guarded; but you will look to the ſentiment itſelf, rather than to its dreſs; to the mind of the writer, and not to the bluntneſs with which he may happen to expreſs it. It is obviouſly the language of a warm man, engaged in the honeſt defence of his friend, and who is brought to what he thinks a juſt concluſion in argument, which perhaps becomes offenſive in proportion to its truth. Truth is undoubtedly no warrant for writing what is reproachful of any *private* man; for if a member of ſociety lives within the law, then if he offends it is againſt God alone, and man has nothing to do with him; and, if he tranſgreſs the laws, the libeller ſhould arraign him before them, inſtead of preſuming to try him himſelf. But as to writings on *general ſubjects*, which are not charged as an infringement on the rights of individuals, but as of a ſeditious tendency, it is far otherwiſe.

When, in the progreſs either of legiſlation or of high national juſtice in Parliament, they who are amenable to no law, are ſuppoſed to have adopted through miſtake or error a principle which, if drawn into precedent, might be dangerous to the public; I ſhall not admit it to be a libel *in the courſe of a legal and* bona fide *publication*, to ſtate that ſuch a principle had *in fact* been adopted; for the people of England are not to be kept in the dark, touching the proceedings of their own repreſentatives. Let us therefore coolly examine this ſuppoſed offence, and ſee what it amounts to—

Firſt, Was not the conduct of the Right Honourable Gentleman, whoſe name is here mentioned, exactly what it is repreſented? Will the Attorney-General, who was preſent in the Houſe of Commons, ſay that it was not? Did not the Miniſter vindicate Mr. Haſtings in what he *had done*; and was not his conſent to that article of the impeachment

peachment founded on the intention of levying a fine on the Zemindar for the ſervice of the ſtate, beyond the quantum which he the Miniſter thought reaſonable?

What elſe is this but an impeachment of error in judgment in the quantum of a fine?

So much for the firſt part of the ſentence, which, regarding Mr. Pitt only, is foreign to our purpoſe; and as to the laſt part of it, which imputes the ſentiments of the Miniſter to the majority that followed him with their votes on the queſtion, that appears to me to be giving handſome credit to the majority for having voted from conviction, and not from courteſy to the Miniſter. To have ſuppoſed otherwiſe, I dare not ſay, would have been a more *natural* libel, but it would certainly have been a greater one—The ſum and ſubſtance therefore of the paragraph is only this: that an impeachment for an error in judgment, is not conſiſtent with theory or the practice of the Engliſh Government.—So SAY I.

I ſay, without reſerve, ſpeaking merely in the abſtract, and not meaning to decide upon the merits of Mr. Haſtings's cauſe, that an impeachment for an error in judgment is contrary to the whole ſpirit of Engliſh criminal juſtice, which, though not binding on the Houſe of Commons, ought to be a guide to their proceedings. I ſay that their extraordinary juriſdiction of impeachment, ought never to be aſſumed to expoſe error, or to ſcourge misfortune, but to hold up a terrible example to corruption and *wilful* abuſe of authority by extra legal pains.

If public men are always puniſhed with due ſeverity, when the ſource of their miſconduct appears to have been *ſelfiſh, corrupt, and criminal*, the public can never ſuffer when their errors are treated with gentleneſs; for no man from ſuch protection to the magiſtrate can think lightly of the charge of magiſtracy itſelf, when he ſees, by the language of the ſaving judgment, that the only title to it is an honeſt and zealous intention.

Gentlemen, if at this moment, or indeed in any other in the whole courſe of our hiſtory, the people of England were to call upon every man in this impeaching Houſe of Commons, who had given his voice on public queſtions, or acted in authority civil or military, to anſwer for the iſſues of our councils and our wars, and if honeſt ſingle intentions for the public ſervice were refuſed as anſwers to impeachments, we ſhould have many relations to mourn for, and many friends to deplore. For my own part, gentlemen, I feel I hope for my country as much as any

man



man that inhabits it: but I would rather ſee it fall, and be buried in its ruins, than lend my voice to wound any Miniſter, or other reſponſible perſon, however unfortunate, who had fairly followed the lights of his underſtanding and the dictates of his conſcience for their preſervation.

Gentlemen, this is no theory of mine; it is the language of Engliſh Law, and the protection which it affords to every man in office, from the higheſt to the loweſt truſts of Government.

In no one inſtance that can be named, foreign or domeſtic, did the Court of King's Bench ever interpoſe its extraordinary juriſdiction, by information againſt any Magiſtrate for the wideſt departure from the rule of his duty, without *the plaineſt and cleareſt proof of corruption.* To every ſuch application, not ſo ſupported, the conſtant anſwer has been, Go to a Grand Jury with your complaint. God forbid that a Magiſtrate ſhould ſuffer from an error in judgment, if his purpoſe was honeſtly to diſcharge his truſt. We cannot ſtop the ordinary courſe of juſtice; but wherever the Court has a diſcretion, ſuch a Magiſtrate is entitled to its protection. I appeal to the noble Judge, and to every man who hears me, for the truth and univerſality of this poſition. And it would be a ſtrange ſoleciſm indeed to aſſert, that in a caſe where the Supreme Court of criminal juſtice in the nation would refuſe to interpoſe an *extraordinary* though a legal juriſdiction, on the principle that the ordinary execution of the laws ſhould never be exceeded, but for the puniſhment of malignant guilt, the Commons in their judicial capacity, growing out of the ſame conſtitution, ſhould reject that principle, and ſtretch them ſtill further by a juriſdiction ſtill more *eccentric.*—Many impeachments have taken place, becauſe the law *could not* adequately puniſh the objects of them; but who ever heard of one being ſet on foot becauſe the law upon principle *would not* puniſh them?——Many impeachments have been adopted for a higher example than a proſecution in the ordinary Courts, but ſurely never for a different example.——The matter therefore, in the offenſive paragraph, is not only an indiſputable truth, but a truth in the propagation of which we are all deeply concerned.

Whether Mr. Haſtings, in the inſtance, acted from corruption, or from zeal for his employers, is what I have nothing to do with; it is to be decided in judgment; my duty ſtops with wiſhing him, as I do, an honourable deliverance.—

liverance.—Whether the Miniſter or the Commons meant to found this article of the impeachment on mere error without corruption, is likewiſe foreign to the purpoſe. The author could only judge from what was ſaid and done on the occaſion. He only ſought to guard the principle which is a common intereſt, and the rights of Mr. Haſtings under it; and was therefore juſtified in publiſhing, that an impeachment, founded in error in judgment, was to all intents and purpoſes illegal, unconſtitutional, and unjuſt.—Gentlemen, it is now time for us to return again to the work under examination.

The author, having diſcuſſed the whole of the firſt article through ſo many pages, without even the imputation of an incorrect or intemperate expreſſion, except in the concluding paſſage, the meaning of which I truſt I have explained, goes on with the ſame earneſt diſpoſition to the diſcuſſion of the ſecond charge, reſpecting the princeſſes of Oude, which occupies eighteen pages, not one ſyllable of which the Attorney-General has read, and on which there is not even a glance at the Houſe of Commons; the whole of this anſwer is indeed ſo far from being a mere cloak for the introduction of ſlander, that I aver it to be one of the moſt maſterly pieces of writing I ever read in my life: from thence he goes on to the charge of contracts and ſalaries, which occupies five pages more, in which *there is not a glance at the Houſe of Commons, nor a word read by the Attorney General.*—He afterwards defends Mr. Haſtings againſt the charges reſpecting the opium contracts. *Not a glance at the Houſe of Commons; not a word by the Attorney-General.* And, in ſhort, in this manner he goes on with the others to the end of the book.

Now is it poſſible for any human being to believe, that a man, having no other intention than to vilify the Houſe of Commons (*as this information charges*), ſhould yet keep his mind thus fixed and ſettled as the needle to the pole, upon the ſerious merits of Mr. Haſtings's defence, without ever ſtraying into matter even queſtionable, except in the two or three ſelected parts out of two or three hundred pages. This is a forbearance which could not have exiſted, if calumny and detraction had been the malignant objects which led him to the enquiry and publication. The whole fallacy therefore ariſes from holding up to view a few detached paſſages, and carefully concealing the general tenor of the book.

Having now finiſhed moſt, if not all of theſe *critical* obſervations, which it has been my duty to make upon this

unfair



unfair mode of profecution; it is but a tribute of common juſtice to the Attorney-General, (and which my perſonal regard for him makes it more pleaſant to pay,) that none of my commentaries reflect in the moſt diſtant manner upon him; nor upon the Solicitor for the Crown, who ſits near me, who is a perſon of the moſt correct honour; —far from it. The Attorney-General, having orders to proſecute in conſequence of the addreſs of the Houſe to his Majeſty, had no choice in the mode; no means at all of keeping the proſecutors before you in countenance, but by the courſe which has been purſued; but ſo far has he been from enliſting into the cauſe thoſe prejudices, which it is not difficult to ſlide into a buſineſs originating from ſuch exalted authority, he has honourably guarded you againſt them; preſſing indeed ſeverely upon my client with the weight of his ability, but not with the glare and trappings of his high office.

Gentlemen, I wiſh that my ſtrength would enable me to convince you of the author's ſingleneſs of intention, and of the merit and ability of his work, by reading the whole that remains of it. But my voice is already nearly exhauſted; I am ſorry my client ſhould be a ſufferer by my infirmity.

Gentlemen, if this book contain a wilfully falſe account of the inſtructions given to Mr. Haſtings for his government, and of his conduct under them, the author and publiſher of it deſerve the ſevereſt puniſhment, for a mercenary impoſition on the public. But if it be true that he was directed to make the ſafety and proſperity of Bengal the firſt object of his attention, and that under his adminiſtration it has been ſafe and proſperous; if it be true that the ſecurity and preſervation of our poſſeſſions and revenues in Aſia were marked out to him as the great leading principle of his government, and that theſe poſſeſſions and revenues, amidſt unexampled dangers, have been ſecured and preſerved; then a queſtion may be unaccountably mixed with your conſideration, much beyond the conſequence of the preſent proſecution, involving perhaps the merits of the impeachment itſelf which gave it birth; a queſtion which the Commons, as proſecutors of Mr. Haſtings, ſhould, in common prudence, have avoided; unleſs that, regretting the unwieldy length of their proceedings againſt him, they wiſhed to afford him the opportunity of this ſtrange anomalous defence.—For although I am neither his counſel, nor deſire to have any thing to do with his innocence, yet, in the collateral defence of my

my client, I am driven to ſtate matter which may be conſidered by many as hoſtile to the impeachment. For if our dependencies have been ſecured, and their intereſts promoted, I am driven, in the defence of my client, to remark, that it is mad and prepoſterous to bring to the ſtandard of Juſtice and Humanity the exerciſe of a dominion founded upon violence and terror. It may and muſt be true, that Mr. Haſtings has repeatedly offended againſt the rights and privileges of Aſiatic Government, if he was the faithful deputy of a power which could not maintain itſelf for an hour without trampling upon both: he may and muſt have offended againſt the laws of God and Nature, if he was the faithful viceroy of an empire wreſted in blood from the people to whom God and Nature had given it: he may and muſt have preſerved that unjuſt dominion over a timorous and abject nation, by a terrifying, overbearing, inſulting ſuperiority, if he was the faithful adminiſtrator of your Government, which, having no root in conſent or affection, no foundation in ſimilarity of intereſts, nor ſupport from any one principle which cements men together in ſociety, could only be upheld by alternate ſtratagem and force. The unhappy people of India, feeble and effeminate as they are from the ſoftneſs of their climate, and ſubdued and broken as they have been by the knavery and ſtrength of civilization, ſtill occaſionally ſtart up in all the vigour and intelligence of inſulted Nature. To be governed at all, they muſt be governed with a rod of iron; and our Empire in the Eaſt would over and over again have been loſt to Great Britain, if civil ſkill and military proweſs had not united their efforts to ſupport an authority which Heaven never gave by means which it never can ſanction.

Gentlemen, I think I can obſerve that you are touched with this way of conſidering the ſubject; and I can account for it. I have not been conſidering it through the cold medium of books, but have been ſpeaking of man and his nature, and of human dominion, from what I have ſeen of them myſelf amongſt reluctant nations ſubmitting to our authority. I know what they feel, and how ſuch feeling can alone be repreſſed. I have heard them in my youth from a naked ſavage, in the indignant character of a prince ſurrounded by his ſubjects, addreſſing the governor of a Britiſh colony, holding a bundle of ſticks in his hand, as the notes of his unlettered eloquence. "Who "is it," ſaid the jealous ruler over the deſart encroached upon by the reſtleſs foot of Engliſh adventure —" Who



" is it that cauſes this river to riſe in the high mountains, " and to empty itſelf into the ocean? Who is it that cauſes " to blow the loud winds of winter, and that calms them " again in the ſummer? Who is it that rears up the ſhade " of theſe lofty foreſts, and blaſts them with the quick " lightning at his pleaſure? The ſame Being who gave to " you a country on the other ſide of the waters, and gave " ours to us; and by this title we will defend it," ſaid the warrior, throwing down his tomohawk upon the ground, and raiſing the war-ſound of his nation. Theſe are the feelings of ſubjugated man all round the globe; and, depend upon it, nothing but fear will controul, where it is in vain to look for affection.

Theſe reflections are the only antidotes to thoſe anathemas of ſuperhuman eloquence which have lately ſhook theſe walls that ſurround us; but which it unaccountably falls to my province, whether I will or no, a little to ſtem the torrent of; by reminding you that you have a mighty ſway in Aſia, which cannot be maintained by the finer ſympathies of life, or the practice of its charities and affections. What will they do for you when ſurrounded by two hundred thouſand men with artillery, cavalry, and elephants, calling upon you for their dominions which you have robbed them of? Juſtice may, no doubt, in ſuch a caſe, forbid the levying of a fine to pay a revolting ſoldiery: a treaty may ſtand in the way of increaſing a tribute to keep up the very exiſtence of the government; and delicacy for women may forbid all entrance into a Zenana for money, whatever may be the neceſſity for taking it.—All theſe things muſt ever be occurring. But under the preſſure of ſuch conſtant difficulties, ſo dangerous to national honour, it might be better perhaps to think of effectually ſecuring it altogether, by recalling our troops and our merchants, and abandoning our Oriental Empire. Until this is done, neither Religion nor Philoſophy can be preſſed very far into the aid of reformation and puniſhment. If England, from a luſt of ambition and dominion, will inſiſt on maintaining deſpotic rule over diſtant and hoſtile nations, beyond all compariſon more numerous and extended than herſelf, and gives commiſſion to her viceroys to govern them with no other inſtructions than to preſerve them, and to ſecure permanently their revenues; with what colour of conſiſtency or reaſon can ſhe place herſelf in the moral chair, and affect to be ſhocked at the execution of her own orders; adverting to the exact meaſure of wickedneſs and injuſtice neceſſary to their execution, and [illegible]

plaining only of *the exceſs of the immorality*; conſidering her authority as a diſpenſation for breaking the commands of God, and the breach of them as only puniſhable when contrary to the ordinances of man?

Gentlemen, ſuch a proceeding begets ſerious reflections. It would be better perhaps for the maſters and ſervants of all ſuch governments, to join in ſupplication, that the Great Author of violated humanity may not confound them together in one common judgment.

Gentlemen, I find, as I ſaid before, I have not ſufficient ſtrength to go on with the remaining part of the book. I hope, however, that, notwithſtanding my omiſſions, you are now completely ſatisfied, that whatever errors or miſconceptions may have miſled the writer of theſe pages, the juſtification of a perſon whom he believed to be innocent, and whoſe accuſers had appealed to the public, was the ſingle object of his contemplation. If I have ſucceeded in that object, every purpoſe which I had in addreſſing you has been anſwered.

It only now remains to remind you, that another conſideration has been ſtrongly preſſed upon you, and, no doubt, will be inſiſted on in reply.——You will be told, that the matters which I have been juſtifying as legal, and even meritorious, have therefore not been made the ſubject of complaint; and that whatever intrinſic merit parts of the book may be ſuppoſed or even admitted to poſſeſs, ſuch merit can afford no juſtification to the ſelected paſſages, ſome of which, even with the context, carry the meaning charged by the information, and which are indecent animadverſions on authority.

Gentlemen, to this I would anſwer (ſtill proteſting as I do againſt the application of any one of the innuendos), that if you are firmly perſuaded of the ſingleneſs and purity of the author's intentions, you are not bound to ſubject him to infamy, becauſe, in the zealous career of a juſt and animated compoſition, he happens to have tripped with his pen into an intemperate expreſſion in one or two inſtances of a long work. If this ſevere duty were binding on your conſciences, the liberty of the preſs would be an empty ſound, and no man could venture to write on any ſubject, however pure his purpoſe, without an attorney at one elbow, and a counſel at the other.

From minds thus ſubdued by the terrors of puniſhment, there could iſſue no works of genius to expand the empire of Human Reaſon; nor any maſterly compoſitions on the general nature *of Government*; by the help of which, the



great commonwealths of mankind have founded their eſtabliſhments; much leſs any of thoſe uſeful applications of them to critical conjunctures, by which, from time to time, our own conſtitution, by the exertion of patriot citizens, has been brought back to its ſtandard.

Under ſuch terrors, all the great lights of ſcience and civilization muſt be extinguiſhed: for men cannot communicate their free thoughts to one another with a laſh held over their heads.

It is the nature of every thing that is great and uſeful, both in the animate and inanimate world, to be wild and irregular; and we muſt be contented to take them with their alloys which belong to them, or live without them. Genius breaks from the fetters of criticiſm; but its wanderings are ſanctioned by its majeſty and wiſdom, when it advances in its path; ſubject it to the critic, and you tame it into dulneſs. Mighty rivers break down their banks in the winter, ſweeping away to death the flocks which are fattened on the ſoil that they fertilize in the ſummer: the few may be ſaved by embankments from drowning, but the flock muſt periſh for hunger. Tempeſts occaſionally ſhake our dwellings, and diſſipate our commerce; but they ſcourge before them the lazy elements, which, without them, would ſtagnate into peſtilence.

In like manner, Liberty herſelf, the laſt and beſt gift of God to his creatures, muſt be taken juſt as ſhe is; you may pare her down into baſhful regularity, and ſhape her into a perfect model of ſevere ſcrupulous Law; but ſhe will be Liberty no longer; and you muſt be content to die under the laſh of this inexorable Juſtice which you have exchanged for the banner of Freedom.

If it be aſked where the line to this indulgence and impunity is to be drawn; the anſwer is eaſy. The Liberty of the Preſs *on general ſubjects* comprehends and implies as much ſtrict obſervance of poſitive law as is conſiſtent with perfect purity of intention, and equal and uſeful ſociety; and what that latitude is, cannot be promulgated in the abſtract, but muſt be judged of in the particular inſtance, and conſequently upon this occaſion muſt be judged of by you, without forming any poſſible precedent for any other caſe; and where can the judgment be poſſibly ſo ſafe as with the members of that ſociety which alone can ſuffer if the writing is calculated to do miſchief to the public?

You



You muſt therefore try the book by that criterion, and ſay whether the publication was premature and offenſive; or, in other words, whether the publiſher was bound to have ſuppreſſed it, until the public ear was anticipated and abuſed, and every avenue to the human heart or underſtanding ſecured and blocked up.

I ſee around me thoſe, by whom, by-and-by, Mr. Haſtings will be moſt ably and eloquently defended *; but I am ſorry to remind my friends, that, but for the right of ſuſpending the public judgment concerning him till their ſeaſon of exertion comes round, the tongues of angels would be inſufficient for the taſk.

Gentlemen, I hope I have now performed my duty to my client; I ſincerely hope that I have; for, certainly, if ever there was a man pulled the other way by his intereſts and affections,—if ever there was a man who ſhould have trembled at the ſituation in which I have been placed on this occaſion; it is myſelf, who not only love, honour, and reſpect, but whoſe future hopes and preferments are linked from free choice with thoſe who, from the miſtakes of the author, are treated with great ſeverity and injuſtice.—— Theſe are ſtrong retardments; but I have been urged on to activity by conſiderations, which can never be inconſiſtent with honourable attachments, either in the political or ſocial world; the love of juſtice and of liberty, and a zeal for the conſtitution of my country, which is the inheritance of our poſterity, of the public, and of the world.

Theſe are the motives which have animated me in defence of this perſon, who was an entire ſtranger to me; whoſe ſhop I never go to; and the author of whoſe publication, as well as Mr. Haſtings, who is the object of it, I never ſpoke to in my life.

One word more, gentlemen, and I have done. Every Human Tribunal ought to take care to adminiſter juſtice, as we look hereafter to have juſtice adminiſtered to ourſelves. Upon the principle which the Attorney General prays ſentence upon my client——God have mercy upon us!——Inſtead of ſtanding before him in judgment with the hopes and conſolations of Chriſtians, we muſt call upon the mountains to cover us; for which of us can preſent, for omniſcient examination, a pure, unſpotted, and faultleſs courſe?—But I humbly expect that the benevolent Author of our being will judge us as I have been pointing out for your example.—Holding up the great volume of our lives

* *Mr. Law, Mr. Plumer, and Mr. Dallas.*



in his hands, and regarding the general ſcope of them; if he diſcovers benevolence, charity, and good-will to man, beating in the heart, where he alone can look;—if he finds that our conduct, though often forced out of the path by our infirmities, has been in general well directed; his all-ſearching eye will aſſuredly never purſue us into thoſe little corners of our lives, much leſs will his juſtice ſelect them for puniſhment, without the general context of our exiſtence; by which faults may be ſometimes found to have grown out of virtues, and very many of our heavieſt offences to have been grafted by human imperfection upon the beſt and kindeſt of our affections. No, gentlemen, believe me, this is not the courſe of Divine Juſtice, or there is no truth in the Goſpels of Heaven.—If the general tenor of a man's conduct be ſuch as I have repreſented it, he may walk through the ſhadow of death, with all his faults about him, with as much cheerfulneſs as in the common paths of life; becauſe he knows, that, inſtead of a ſtern accuſer to expoſe before the Author of his nature thoſe frail paſſages, which, like the ſcored matter in the book before you, chequers the volume of the brighteſt and beſt-ſpent life, his mercy will obſcure them from the eye of his purity, and our repentance blot them out for ever.

All this would, I admit, be perfectly foreign and irrelevant, if you were ſitting here in a caſe of property between man and man, where a ſtrict rule of law muſt operate, or there would be an end in that caſe of civil life and ſociety.

It would be equally foreign, and ſtill more irrelevant, if applied to thoſe ſhameful attacks upon private reputation which are the bane and diſgrace of the preſs; by which whole families have been rendered unhappy during life, by aſperſions cruel, ſcandalous, and unjuſt. *Let* SUCH LIBELLERS *remember, that no one of my principles of defence can at any time, or upon any occaſion, ever apply to ſhield* THEM *from puniſhment*; becauſe ſuch conduct is not only an infringement of the rights of men, as they are defined by ſtrict law, *but is abſolutely incompatible with honour, honeſty, or miſtaken good intention.*

On ſuch men let the Attorney General bring forth all the artillery of his office, and the thanks and bleſſings of the whole public will follow him. But this is a totally different caſe. Whatever private calumny may mark this work, it has not been made the ſubject of complaint; and we have therefore nothing to do with that, nor any right to conſider it.

We

We are trying whether the public could have been conſidered as offended and endangered, if Mr. Haſtings himſelf, in whoſe place the author and publiſher have a right to put themſelves, had, under all the circumſtances which have been conſidered, compoſed and publiſhed the volume under examination. That queſtion cannot in common ſenſe be any thing reſembling *a queſtion of* LAW; but is a pure queſtion of FACT, to be decided on the principles which I have humbly recommended. I therefore aſk of the Court, that the book itſelf may now be delivered to you. Read it with attention; and as you find it, pronounce your verdict.

LORD KENYON'S CHARGE TO THE JURY.

Gentlemen of the Jury,

I DO not feel that I am called upon to diſcuſs the nature of this libel, or to ſtate to you what the merit of the compoſition is, or what the merit of the argument is; but merely to ſtate what the queſtions are, to which you are to apply your judgment, and the evidence given in ſupport of this information.

It is impoſſible, when one reads the preface to this information, which ſtates that the libel was written to aſperſe the Houſe of Commons, not to feel that it is a matter of conſiderable importance; for I don't know how far a fixed general opinion, that the Houſe of Commons deſerves to have crimes imputed to it, may go; for men that are governed will be much influenced by the confidence repoſed in the governors. Mankind will never forget that governors are not made for the ſake of themſelves, but are placed in their reſpective ſtations to diſcharge the functions of their office for the ſake of the public; and, if they ſhould ever conceive that the governors are ſo inattentive to their duty as to exerciſe their functions to keep themſelves in power, and for their own emolument, without attending to the intereſts of the public, government muſt be relaxed, and at laſt crumble to duſt; and therefore, if the caſe is made out which is imputed to the defendant, it is no doubt a moſt momentous caſe indeed; but though it is ſo, it does not follow that the defendant is guilty; and Juries have been frequently told, and I am bound, in the ſituation in which I ſtand, to tell you, that, in forming your judgment upon this caſe, there are two points for you to attend to; namely,

Whether



Whether the defendant, who is charged with having publiſhed this, did publiſh it; and,

Whether the ſenſe which the Attorney General, by his innuendos in this information, has affixed to the different paſſages, is fairly affixed to them.

From any conſideration as to the firſt of theſe points you are delivered, becauſe it is admitted that the book was publiſhed by the defendant; but the other is the material point to which you are to apply your judgment. It has been entered into with wonderful abilities, much in the detail; but it is not enough for a man to ſay, I am innocent; ---it belongs to the Great Searcher of Hearts to know whether men are innocent or not; we are to judge of the guilt or innocence of men (becauſe we have no other rule to go by) by their overt-acts, from what they have done.

In applying the innuendos, I accede entirely to what was laid down by the Counſel for the Defendant, and which was admitted yeſterday by the Attorney General, as Counſel for the Crown, that you muſt, upon this information, make up your minds, that this was meant as an aſperſion upon the Houſe of Commons——and I admit alſo, that, in forming your opinion, you are not bound to confine your enquiry to thoſe detached paſſages which the Attorney General has ſelected as offenſive matter, and the ſubject of proſecution.

But let me, on the other ſide, warn you, that though there may be much good writing, good argument, morality, and humanity, in many parts of it; yet, if there are offenſive paſſages, the good part will not ſanctify the bad part.

Having ſtated this, I ought alſo to tell you that, in order to ſee what is the ſenſe to be fairly imputed to thoſe paſſages that are culled out as the offenſive paſſages, you have a right to look at all the context; you have a right to look at the whole book; and, if you find it has been garbled, and that the paſſages ſelected by the Attorney General do not bear the ſenſe imputed to them, the man has a right to be acquitted; and God forbid he ſhould be convicted!

It is for you, upon reading the information (which if you go out of Court you will undoubtedly take with you), comparing it with this pamphlet, to ſee whether the ſenſe the Attorney General has affixed is fairly affixed; always being guided by this, that, where it is truly ambiguous and doubtful, the inclination of your judgment ſhould be on the ſide of innocence; but if you find you cannot acquit *him without* diſtorting ſentences, you are to meet this

caſe, and all other caſes as I ſtated yeſterday, with the fortitude of men, feeling that they have a duty upon them ſuperior to all leaning to parties; namely, adminiſtering juſtice in the particular cauſe.

It would be in vain for me to go through this pamphlet which has been juſt put into my hand, and to ſay whether the ſenſe affixed is the fair ſenſe or not. As far as diſcloſed by the information, theſe paſſages afford a ſtrong bias, that the ſenſe affixed to them is the fair ſenſe; but of that you will judge, not from the paſſages themſelves merely, but by reading the context of the whole book, ſo much at leaſt as is neceſſary to enable you to aſcertain the true meaning of the author.

If I were prepared to comment upon the pamphlet, in my ſituation it would be improper for me to do it; my duty is fulfilled, when I point out to you what the queſtions are that are propoſed to your judgment, and what the evidence is upon the queſtions; the reſult is yours and yours only.

The Jury withdrew for about two hours, when they returned into Court with a Verdict finding the Defendant NOT GUILTY.

THE KING *againſt* THE DEAN OF ST. ASAPH.

The very intereſting queſtion, of the Right of Juries to judge of the LAW as well as FACT in the Caſe of LIBEL, is ſo largely diſcuſſed in the following ſpeech of Earl Mansfield, when he delivered the judgment of the court in the Caſe of the Dean of St. Aſaph, that it cannot fail of being acceptable to our readers. The Dean had been tried at Shrewſbury before Judge Buller for a Libel; and the Judge ſaid, there were two objects only for their conſideration, namely, the fact of the publication, and the truth of the *innuendos*; the verdict of the jury was, Guilty of publiſhing, but whether a libel or not they did not find. A motion was made in Michaelmas Term, 1784, for a new trial on the ſcore of a miſdirection to the jury, when EARL MANSFIELD delivered the judgment of the court as follows:

This motion to ſet aſide the verdict, and to grant a new trial, for the miſdirection of the Judge, ſuppoſes that, upon the verdict, either as a general, or as minutes of a ſpecial one, to be reduced into form, judgment may be given; for if the verdict were defective, and omitted finding any thing within the province of the jury to find,

no



no judgment could be given, and there muſt be a *venire de novo*; conſequently this motion would be improper.

Four objections have been made to the direction of the Judge. The firſt, peculiar to this caſe; and therefore I begin with it, that he did not leave the evidence of a lawful excuſe or juſtification to the jury as a ground for acquitting the defendant. Circumſtances merely of alleviation, or aggravation, are irrelevant upon the trial; they are immaterial to the verdict; and they may be made uſe of when judgment is given, to increaſe or leſſen the puniſhment. Circumſtances which amount to a lawful excuſe, or juſtification, are proper upon the trial, and can only be uſed then. Upon every ſuch defence, there ariſe two queſtions; one of law, the other of fact; the firſt to be decided by the Court, the ſecond by the jury. Whether the fact alleged, ſuppoſing it true, be a legal excuſe, is a queſtion of law; whether the allegation be true, is a queſtion of fact; and according to this diſtinction the Judge ought to direct, and the jury ought to follow the direction; though, by means of a general verdict, they are intruſted with the power of confounding the law and the fact, and follow the prejudices of their affections or paſſions.

The circumſtances urged in defence are, the letter of the 24th of January to Mr. Edwards, and the advertiſement, and what is ſaid by Mr. Jones of the converſation with the defendant on the 7th of January. Upon this part of the caſe we muſt ſuppoſe the paper ſeditious or criminal; then the defendant, *knowing it had been ſtrongly objected to*, publiſhed it with an advertiſement, avowing and juſtifying the doctrine. The next circumſtance is from the evidence of Edward Jones; that the defendant knew the paper was objected to, as having a ſeditious tendency, and might do miſchief, if tranſlated into *Welch*; and therefore that deſign was laid aſide. This he knew on the 7th of January, and ſent it to be printed on the 24th; and it was read at a county meeting with a rope about his neck (as he ſaid), and that it was *not ſo bad*. We are all clearly of opinion, that if the writing be criminal, thoſe circumſtances are aggravation, and ought not to have been left as any excuſe. What was meant by ſaying the affidavit ſhould have been ſet out in the indictment, I do not comprehend; much leſs that blaſphemy may be charged in the Scripture, by ſtating half the ſentence. If any part of the context qualify what is ſet forth, it may be given in

in evidence *. Every circumſtance which tends to prove the meaning, is every day given in evidence; and the jury are the Judges, and muſt find the meaning.

The ſecond objection is, that the Judge did not give his own opinion, whether the writing was a libel, or ſeditious, or criminal.

The third was, that the Judge told the jury they ought to leave that queſtion upon the record to the court, if they had no doubt of the meaning and publication.

And the fourth, that he did not leave the defendant's intent to the jury.

The anſwer to theſe objections is, that by the conſtitution the jury ought not to decide the queſtion of law, whether ſuch a writing, of ſuch a meaning, publiſhed without a lawful excuſe, be criminal: and that they cannot decide it againſt the defendant, becauſe, after a verdict, it remains open upon the record: therefore it is the duty of the Judge to adviſe the jury to ſeparate the queſtion of fact from the queſtion of law; and as they ought not to decide the law, and the queſtion remains entire for the Court, he is not called upon to tell them his own opinion. It is almoſt peculiar to the form of a proſecution for a libel, that the queſtion of law remains entirely open for the Court upon the record, and that the jury cannot decide it againſt the defendant; ſo that a general verdict, that the defendant is guilty, is equivalent to a ſpecial verdict in other caſes. It finds all which belongs to the jury to find, and finds nothing as to the queſtion of law. Therefore, when the jury are ſatisfied of every fact within their province to find, they have been adviſed to find the defendant guilty, and in that ſhape to take the opinion of the Court upon the law; and no caſe has been cited of a ſpecial verdict, in a proſecution for a libel, leaving the queſtion of law upon the record to the Court; though to be ſure it might be left in that form: but the other is more ſimple and better. A criminal intent from doing a thing in itſelf criminal, without a lawful excuſe, is an inference of law. Where an innocent act is made criminal, when done with a peculiar intent, there the intent is the material fact to conſtitute the crime. The ſubject-matter of theſe three objections has ariſen upon every trial for a libel ſince the Revolution, now near 100 years ago. In every reign there have been many ſuch trials both of a private and public nature. In every

* *Vid. R. v. Bear. Salk.* 417.

reign



reign there have been ſeveral defended with all the acrimony of party animoſity, and a ſpirit ready to conteſt every point, and to admit nothing. But during all this time, as far as it can be traced, one may venture to ſay, that the doctrine of every Judge has been conſonant to the doctrine of Mr. Juſtice Buller; and no counſel has complained of it by an application to the Court. Counſel for the Crown to remove the prejudices of the jury, and to ſatisfy the bye-ſtanders, have expatiated upon the enormity of the libel. Judges, with the ſame view, have ſometimes done the ſame thing: both have done it wiſely with another view, to obviate the captivating harangues of defendants' counſel to the jury, that they can and ought to find that in law the paper is no libel. But the formal direction of every Judge, under which every lawyer has ſo far acquieſced as not to complain of it to the Court, ſeems to me, ever ſince the Revolution, to have been agreeable to the direction given in this caſe. It is difficult to cite caſes; the trials are not printed; unleſs a queſtion ariſes, notes are not taken: nobody takes a note of a direction of courſe not diſputed. We muſt, as in all caſes of tradition, trace backwards, and preſume from the uſage, which is remembered, that the preceding uſage was the ſame. The Craftſman was a celebrated party paper *, written in oppoſition to the Miniſtry of Sir Robert Walpole, by many men of high rank and great abilities; the whole party eſpouſed it. It was thought proper to proſecute the famous Hague Letter; I was at the trial; it happens to be printed in the 9th vol. of St. Tr. 255. There was a great concourſe, great expectation, and many perſons of high rank were preſent to countenance the defendant. Mr. Fazakerly and Mr. Bootle were the leading counſel for the defendant; they ſtarted every objection, and laboured every point: and when the Judge over-ruled them, he uſually ſaid, "if I am wrong, you know where "to apply." The Judge was Lord Chief Juſtice Raymond, who had been eminent at the bar in the reign of Queen Anne, Solicitor and Attorney-General in the reign of George the Firſt, and intimately connected with Sir Edward Northey; ſo that he muſt have known what the ancient practice had been. The cauſe was ſo blended with party paſſion, that it required his utmoſt attention; yet, when he came to ſum up and direct, he did it as of

* *Vid. R. v. Tutchin*, 1704. 5 *St. Tr.* 532.

courſe,

courſe, juſt as Mr. Juſtice Buller did on this occaſion. Fazakerly and Bootle, very able lawyers, and connected in party with the writers of the Craftſman, never thought of complaining to the Court. The other trials before Lord Raymond are not printed; nor to be found in any notes; but, to be ſure, his direction in all was to the ſame effect. I recollect one, where the Craftſman was acquitted, from a ballad made by Mr. Pulteney:—

For Sir Philip well knows that his innuendos
No longer will ſerve him in verſe or in proſe;
For twelve honeſt men have decided the cauſe,
Who are judges of fact, tho' not judges of laws.

There are no notes of the trials before Lord Hardwicke, or Lord Chief Juſtice Lee., before 1752, when the caſe of the King v. Owen came on before Chief Juſtice Lee.—It happens to be printed in the *State Trials* †. I attended as Solicitor General; Lord Chief Juſtice Lee, the moſt ſcrupulous obſerver and follower of precedents, directed, as of courſe, in the ſame manner as was done in this caſe. When I was Attorney General, I proſecuted for ſome libels; one I remember was the King v. Nutt. He was convicted under the ſame direction by Lord Chief Juſtice Ryder. In the year 1756, I came into the office I now hold, and, upon the firſt proſecution for a libel which ſtood in my paper, I think it was the caſe of the King v. Shebbeare, I made up my mind as to the direction I ought to give; and I have uniformly given the ſame almoſt in the ſame form of words. No counſel ever complained of it to the Court. Upon every defendant being brought up for judgment, I have always ſtated the direction I gave, and the Court has always aſſented to it. The defence of a lawful excuſe never exiſted in any caſe before me: therefore I told the jury, "if they were ſatisfied with the evidence of the publication, and that the meaning and innuendos were as ſtated, they ought to find the defendant guilty; the queſtion of law was upon the record for the judgment of the Court." The direction being as of courſe, and no queſtion raiſed concerning it in the Court, though I have had the misfortune to try many libels in very warm times againſt defendants moſt obſtinately and factiouſly de-

† 10 *St. Tr. Ap.* 196.

fended,



fended, there are no notes or reports of what paſſed. In one caſe, the King v. Woodfall, on account of another kind of queſtion, there is a report; and there the direction is adopted by the whole Court as right, and the doctrine of Mr. Juſtice Buller laid down in expreſs terms. Such a judicial practice in the preciſe point from the Revolution, as I think, down to the preſent day, is not to be ſhaken by general theoretical arguments of popular declamation. Every ſpecies of criminal proſecution has ſomething peculiar in the mode of procedure; therefore general propoſitions, applied to all, tend only to complicate and confound the queſtion. No deduction or concluſion can be drawn from what a jury may do from the form of the procedure to what they ought to do upon the fundamental principles of the Conſtitution, and the reaſon of the thing, if they will act with integrity and a good conſcience. The fundamental definition of trials by jury depends upon an univerſal maxim, without an exception, *ad quæſtionem*. Where the queſtions can be ſevered by the form of the pleadings, the diſtinction is preſerved upon the face of the record, and the jury cannot encroach upon the juriſdiction of the Court. But where by the form of pleading the two queſtions are blended together, and cannot be ſeparated upon the face of the record, the diſtinction is preſerved by the honeſty of the jury. The conſtitution truſts that, under the direction of the Judge, they will not uſurp a juriſdiction which is not their province. They do not know, and are not preſumed to know, the law; they are not ſworn to decide the law; they are not required to do it. If it appear upon the record, they ought to leave it there; or they may find the facts ſubject to the opinion of the Court upon the law. But, upon the reaſon of the thing, and the eternal principles of juſtice, the jury ought not to aſſume the juriſdiction of law: they do not know, and are not preſumed to know, any thing of the matter; they do not underſtand the language in which it is conceived, or the meaning of the terms; they have no rule to go by but their paſſions and wiſhes: It is ſaid if a man give a right ſentence upon hearing one ſide only, he is a wicked Judge, becauſe he is right by chance only, and has neglected taking the proper method to be informed: ſo a jury who uſurp the judicature of law, though they happen to be right, are themſelves wrong, becauſe they are right by chance only, and have not taken the conſtitutional way of deciding the queſtion. It is the

duty

duty of the Judge, in all caſes upon general iſſues, to tell the jury how to do right, though they have it in their power to do wrong, which is a matter between God and their own conſciences. To be free, is to live under a Government by law. The liberty of the preſs conſiſts in printing without any previous licence, ſubject to the conſequence of law. The licentiouſneſs of the preſs is *Pandora's* box, the ſource of every evil. Miſerable is the condition of individuals, dangerous is the condition of the State, if there is no certain law, or (which is the ſame thing) no certain adminiſtration of law to protect individuals, or to guard the State. Jealouſy of leaving the law to the Court, as in other caſes, is, *now*, in the preſent ſtate of things, puerile rant and declamation. The Judges are totally independent of the Miniſters that may happen to be, and of the King; their temptation is rather to the popularity of the day; and I agree with the obſervation cited at the bar from Mr. Juſtice Foſter, that a popular Judge is an odious and pernicious character. The judgment of the Court is not final: In the laſt reſort it may be reviewed in the Houſe of Lords, where the opinion of all the Judges is taken. In oppoſition to this, what is contended for? that the law ſhall be in every particular cauſe what any 12 men, who ſhall happen to be the Jury, ſhall be inclined to think; liable to no review, and ſubject to no control, under all the prejudices of the popularity of the day, and under all the bias of intereſt in this town, where thouſands, more or leſs, are concerned in the publication of newſpapers, paragraphs, and pamphlets. Under ſuch an adminiſtration of law no man could tell, no counſel could adviſe, whether a paper were or were not puniſhable. I am glad that I am not bound to ſubſcribe to ſuch an abſurdity, ſuch a ſoleciſm in politics; but that, agreeably to the uniform judicial practice ſince the Revolution, warranted by the fundamental principles of the conſtitution of trials by jury, and upon the reaſon and fitneſs of the thing, I am of opinion this motion ſhould be rejected, and the rule diſcharged.

But the judgment was afterwards arreſted on a defect in the indictment.

SHER-



SHERRINGTON *and* BULKLEY'S CASE.

The priſoners were indicted on the ſtatute 21 Geo. III. cap. 68, for ſtealing a quantity of lead affixed to the WORK-HOUSE of the Poor of the Old Artillery-Ground; and the property was laid to belong to "*the Truſtees of the Poor of* "*the Old Artillery-Ground.*"

By an act of Parliament paſſed 14 Geo. III. cap. 30. certain perſons therein named, and their ſucceſſors, to be elected and appointed under and by virtue of the ſaid act, are appointed Truſtees for putting in execution all the powers thereby given for providing a work-houſe, and for employing and maintaining the poor of the ſaid Old Artillery-Ground, or any matter or thing concerning the ſame; and all *fixtures*, furniture, and other things bought or provided for the uſe of the poor, are veſted in the ſaid Truſtees and their ſucceſſors, for the purpoſes of the act. And then it goes on in theſe words: "And the ſaid Truſtees are "hereby empowered to prefer or order the preferring of "any bill or bills of indictment againſt any perſon or per-"ſons who ſhall ſteal, take, or carry away any or any part "of ſuch things; and the monies and things which ſhall "be ſo ſtolen, taken, or carried away, ſhall, in every ſuch "indictment, be laid and deemed, and taken to be the pro-"perty of *the Truſtees of the Poor of the Old Artillery-Ground.* "And every indictment ſo preferred ſhall be held good in "law to all intents and purpoſes."

The queſtion was, Whether the indictment had well laid the property? And the Court held that it had not; for as the Act of Parliament had not incorporated the Truſtees, and by that means given them collectively *a public name*, the property ſhould have been laid as belonging to A. B. C. *&c.* by their proper names, and the words "*Truſtees of the Poor of the Old Artillery-Ground*" ſubjoined as a deſcription of the capacity in which they were authoriſed by the legiſlature to act.

THE

THE LAWYER'S AND MAGISTRATE'S MAGAZINE.

For MARCH, 1790.

Adjudged Cases in the Courts at Weſtminſter in Michaelmas Term.

HIGH COURT OF CHANCERY, MICH. 29 GEO. III.

Fox againſt MACKRETH, DAWES, *and* GARFORTH, ESQRS.

A truſtee for the ſale of eſtates for payment of debts who purchaſes himſelf, and, previous to the completion of his contract, ſells the eſtate at an advanced price, is a truſtee for the original vendor for the produce of the ſecond ſale.

CASE.

THE plaintiff Fox, being ſeiſed in tail of an eſtate in Surrey, ſubject to an eſtate for life, in ſome parts thereof, to his mother for her jointure, and likewiſe ſeiſed of copyhold and leaſehold eſtates in the ſame county, and alſo entitled to ſeveral other eſtates in expectancy or for life only, had, before he came of age, embarked in a very expenſive courſe of life, and was reduced to great diſtreſſes, and, under theſe circumſtances, had procured money by granting annuities; and engaging his friends, who were of age, in bonds and judgments, for ſecuring the payment of them, his friends propoſed that, as ſoon as might be after he ſhould attain his age of 21 years, he ſhould ſuffer a recovery of the Surrey eſtate, which ſhould be conveyed to truſtees to be ſold, for the payment of his debts, and redeeming the an-



nuities for which he and his friends had engaged. He attained his age of 21 in Auguſt 1777, and was, very ſoon afterwards, introduced to the defendant Mackreth, and, on account of the plaintiff's inability to make a ſecurity by mortgage, as a recovery could not be ſuffered till Michaelmas Term, it was agreed, that the defendants, Mackreth and Dawes, ſhould ſupply the plaintiff with the ſum of 5,100l. upon the plaintiff's granting two annuities of 500l. and 350l. each for his life. Dawes, on the 23d of September, advanced the 5,100l. for which the following ſecurities were executed. A bond of that date by the plaintiff, in the penal ſum of 6000l. for ſecuring to the defendant Dawes an annuity of 500l. for the life of the plaintiff, a warrant of attorney of even date to confeſs judgment on the ſaid bond, and an indenture *tripartite*, between the plaintiff on the 1ſt part, Dawes of the 2d part, and Garforth, of the 3d part, whereby lands in the county of York, of which the plaintiff was ſeiſed for life, were conveyed to Garforth, for ſecuring the payment of the annuity of 500l. to Dawes. The annuity of 350l. was ſecured by a ſimilar bond of the ſame date, warrant of attorney to confeſs judgment thereon, and a ſimilar conveyance of the ſame lands to Garforth, for better ſecuring the ſame. In the annuity of 500l. Mackreth admitted he was intereſted with Dawes, but denied that he was ſo in that of 350l. In Michaelmas Term 1777, a recovery was ſuffered of the freehold part of the Surrey eſtates, by which they were veſted (ſubject to the mother's eſtate for life in a part thereof) in Oliver Farrer, in truſt to convey the ſame in ſuch manner as the plaintiff ſhould direct, Mr Farrer having agreed to act as a truſtee for the purpoſe of ſelling the ſame and diſcharging the debts, under the direction of two of the plaintiff's friends (which appear to have been Lord Ligonier and Lord Grantley), if they could be prevailed upon to accept the truſt. In December 1777, the plaintiff, being threatened with an arreſt for the ſum of 2000l. applied to the defendant Mackreth, who agreed to lend the plaintiff 3000l. on mortgage of the Surrey eſtate; upon which the mortgage-deeds, dated 22d and 23d of this month, were accordingly prepared and executed. At the time of the execution of theſe deeds, it was propoſed that defendant Mackreth ſhould be a truſtee with Farrer, for payment of the debts and redeeming the annuities, which the defendant Mackreth propoſed the defendant Dawes for that purpoſe, as being, from the courſe of his buſineſs, well acquainted with many of the perſons who had purchaſed the plaintiff's other annuities, and could aſſiſt in purchaſing them at a cheaper rate than Mr. Farrer; which

aſſented to by the plaintiff, upon an aſſurance that nothing ſhould be done without Mr. Farrer being conſulted, and approving thereof. In the ſame month the plaintiff delivered to the defendant Mackreth, a particular or rental of the eſtate in Surrey, made by Thomas Jackman; by which it appeared, that the rents of the houſes and cottages on the premiſſes amounted to 283 l. 1 s. and thoſe of the lands to 979 l 14 s. (ſubject to the mother's jointure, which was ſtated at 240 l. a year); and the timber was valued in the rental at 4000 l. and the whole was valued at 45,000 l. It was alſo in evidence, that Mackreth ſent down a man, of the name of Hampton, to view the eſtate, who was there a week; but what valuation he made, or whether the ſame was communicated to Mackreth, did not appear. A truſt-deed was prepared by Garforth, reciting the mortgage, by which the eſtates were conveyed to Mackreth and Dawes (ſubject to Mackreth's mortgage and the annuity to Dawes), in truſt to ſell or mortgage the ſame, and to pay the debts, and redeem the annuities granted by the plaintiff. Theſe deeds being ſent to Mr. Farrer, he made ſome objections thereto, on account of the ſums advanced, as the prices of the annuities, not being ſcheduled as groſs ſums carrying intereſt at 5 *per cent.* and alſo on account of the truſtees being impowered to ſell or mortgage the eſtates without the intervention of Mr. Fox. And it being afterwards agreed, that Mackreth ſhould pay off Dawes, and advance ſome further ſums, a deed-poll was prepared, calculated for execution on the 16th of January, 1778, and indorſed on the mortgage-deed, to ſecure ſuch further ſum of 7000 l. (conſiſting of 5,100 l. the conſideration-money for the annuities granted by the plaintiff to Dawes, with 212 l. 10 s. intereſt thereon, for the quarter's arrear due 23d December, 1777, but which was not paid by Mackreth to Dawes until 16th Jan. 1778) and 511 l 14 s. 9½ d. 23 days arrear of the ſaid annuities from 23d December to ſaid 16th January, and 1635 l. 15 s. 2½ d. paid to the plaintiff on that 16th January, 1778; a new truſt-deed was alſo prepared, in which this deed poll was recited, and the 3000 l. and 7000 l. made the firſt charges on the eſtates. On the 16th January, 1778, the plaintiff Fox and the defendant Mackreth dined together at the houſe of the defendant Garforth, for the purpoſe of executing theſe deeds; and, after dinner, and before the plaintiff had executed the deeds, a converſation aroſe, in which it was propoſed that the defendant Mackreth ſhould become the purchaſer of the eſtate; and Jackman's valuation of 45,000 l was mentioned by the plaintiff *as a fair price*, which was objected to by [illegible] *conſidering the value* put thereby upon the houſes



and lands; upon which the defendant made a calculation of the houſes at fourteen years purchaſe, and the lands at thirty; together with the houſhold furniture, valued at 500 l. and the timber at 4000 l. (on which laſt two articles they agreed) amounting to 37,853 l. 14 s. The plaintiff afterwards offered to ſell the eſtates to the defendant for 42,000 l. upon which the defendant ſaid, he would ſplit the difference, and give 39,500 l. for the ſame, but would not give more; and, the plaintiff not agreeing to accept the terms, the truſt-deeds were then executed by the plaintiff. After the deeds were executed, the converſation was renewed; and the plaintiff expreſſing ſome concern with reſpect to his mother's jointure, in caſe he ſhould accept the defendant's terms, the defendant offered the 39,500 l. and to ſubject himſelf to the payment of the plaintiff's mother's jointure, in caſe ſhe ſhould ſurvive him; upon which the parties agreed, and the defendant Garforth (who had been abſent during the greateſt part of the treaty) was called in, and drew up a memorandum of ſuch agreement, by which the money was to be paid on or before the 25th of March next, till which time the plaintiff was to receive the rents and profits, and then convey the eſtate to the plaintiff; and about 12 o'clock at night, this memorandum was ſigned by the plaintiff, upon which the truſt deed was cancelled. On the 28th of the ſame month, articles for the purchaſe were executed by both parties. On the 24th April following, the plaintiff, and Anna Fox his mother, on the 2d of May, executed conveyances of the eſtates to the defendant, in conſideration of 39,500 l.; 11,097 l. of which was retained by the defendant, in payment of the above mortgage of 3000 l. the 7000 l. ſecured by the deed-poll, and ſome other ſums charged by the defendant, as advanced to the plaintiff, and the defendant gave the plaintiff, as a ſecurity for the reſidue, being 28,408 l. a common accountable receipt; and afterwards, on the objection of the plaintiff, to this as the only ſecurity for the money, the defendant wrote on the ſame piece of paper, which contained the ſaid accountable receipt, the following charge, "25th April, 1773, I do hereby charge "all my eſtates in the county of Surrey, with the payment "of the above ſum of 28,403 l and intereſt." At the time of ſigning the above, the defendant had no eſtates in the county of Surrey, but thoſe purchaſed by him of the plaintiff. And the defendant gave to the plaintiff no other ſecurity for the reſidue of the money, than the receipt and charge. In the interval between the execution of the articles and that of the conveyances, Mackreth had treated with *Thomas Page*, Eſq. for the ſale of the whole of the

eſtate; and on the 21ſt March, Mr. Page agreed to give 50,500 l. for the ſame, but no article was entered into between him and the defendant till the 30th April following; immediately after, Page was let into poſſeſſion, and was to receive the rents and profits from Lady-day then laſt. The treaty with Page was totally unknown to the plaintiff, when he executed the conveyance to the defendant. The plaintiff drew upon the defendant for ſeveral ſums, on account of the purchaſe-money; and in October, 1778, having ſent for an account, the defendant drew one out, by which he made a balance remaining in his hands of 773 l. 18 s. 9 d. but admitted in his anſwer that he had therein charged monies unpaid, as the ſuppoſed amount of two annuities and the arrears thereof then unredeemed; and that, afterwards, in May, 1779, having then ſettled the ſaid annuities, he ſent the plaintiff another account, in which he made the balance 6161. 17 s. above the other balance of 773 l. 18 s 9 d. In June, 1779, the plaintiff, being again in diſtreſs, applied to the defendant, when he advanced him 2,100 l. a year, for plaintiff's life, ſecured by a bond, in the penal ſum of 4,200 l. and warrant of attorney to enter up judgment.

Upon diſcovery of the ſale to Page, under the circumſtances as ſtated above, the plaintiff filed his bill, inſiſting that the defendant Mackreth being a truſtee for him under the truſt deed for payment of debts, it was his duty to ſell the ſame for the advantage of the plaintiff.

The defendant, Mackreth, by his anſwer, inſiſted on the fairneſs of the tranſaction; and that the price at which he bought the eſtate was an adequate price, though he expected to have ſome benefit by ſelling it out in parcels; but that the purchaſer, Mr. Page, having an eſtate in the neighbourhood, gave a larger price than it was worth to other perſons.

The cauſe was heard at the Rolls, before Sir Lloyd Kenyon; when his Honour was pleaſed to make his decree, that undue advantage was taken, by the defendant Mackreth, of the confidence repoſed in him by the plaintiff Fox; and that therefore the defendant Mackreth ought to be conſidered as a truſtee to all the eſtates and intereſts compriſed in the conveyance of the 23d and 24th days of April, 1778, for the ſaid plaintiff Fox, after the execution of the ſaid deeds; and ordered it to be referred to the Maſter to take an account of the money received by the defendant Mackreth, from Page, and to compute intereſt thereon at 5 l. *per cent.* from the time of receiving the ſame, and to take an account of the *money paid by defendant* Mackreth to Dawes, *of the annuities of* 500 l. and 300 l. and alſo an account

account of the money advanced by Mackreth, on account of the annuity of 350l. in 1779, and an account of money received by Mackreth, on account of the mortgage in 1778, and under the contract for the purchaſe of the eſtate, and compute intereſt on the ſame; and that the defendant Mackreth ſhould pay the plaintiff the coſts of the ſuit, in reſpect of his inſiſting on the conveyance of the 23d and 24th of April, 1778, as a conveyance for his own benefit; and granted an injunction againſt the defendant Mackreth, to reſtrain him from proceeding at law, touching any matter in queſtion in the cauſe; and reſerved further conſideration.

From this decree, the defendant appealed to the Lord Chancellor, before whom the Caſe was fully argued, and his Lordſhip delivered his opinion as follows:

The doubt I have is, whether this caſe affords facts from which principles ariſe to ſet aſide this tranſaction, which will not, by neceſſary application, draw other caſes into hazard. And, without inſiſting upon technical morality, I don't agree with thoſe who ſay that where an advantage has been taken in a contract, which a man of delicacy would not have taken, it muſt be ſet aſide; ſuppoſe, for inſtance, that *A.* knowing there to be a mine in the eſtate of *B.* of which he knew *B.* was ignorant, ſhould enter into a contract to purchaſe the eſtate of *B.* for the price of the eſtate, without conſidering the mine, could the Court ſet it aſide? Why not, ſince *B.* was not appriſed of the mine, and *A.* was? Becauſe *B.* as the buyer, was not obliged, from the nature of the contract, to make the diſcovery. It is therefore eſſentially neceſſary, in order to ſet aſide the tranſaction, not only that a great advantage ſhould be taken, but it muſt ariſe from ſome obligation in the party to make the diſcovery. The court will not correct a contract, merely becauſe a man of nice honour would not have entered into it; it muſt fall within ſome definition of fraud; the rule muſt be drawn ſo as not to affect the general tranſactions of mankind. His Honour has referred a great number of accounts to the Maſter. If the account in the preſent caſe is neceſſary to lead to the judgment, the latter ſhould have been ſuſpended till the former was taken. I ſhall ſtate the caſe merely as it ſtands on the tranſaction upon the day of the ſale; I ſhall alſo conſider that there are certain terms which I muſt find in analogy to the character of a juryman. In the firſt place, I muſt find the value of the eſtate to be the ſum for which it was ſold to Page; for it will be in vain to argue that there was any confidence repoſed in Mackreth, or fraud committed by him, if no loſs accrued to Fox. If the value of the eſtate be that which Mackreth gave, it would on that

put an end to the diſpute. If the value be ſuch as now repreſented, that does not make an end of the matter, unleſs the advantage was procured by ſome of thoſe frauds which the court has taken notice of. The Maſter of the Rolls has decreed the defendant to be a truſtee for Fox. He becomes ſuch by conſequence; for if it be true that he has cheated Fox, though the legal eſtate paſſed to him, the equitable claim is Fox's. But this argument does not turn from the mere circumſtances of value, for ſuppoſe the eſtate to have been worth 50,000 l. on the 16th January 1778, and that Mackreth bought it by fraud for 40,000 l. whereby Fox was cheated of 10,000 l. and ſuppoſe, by croſs events, the value had ſunk more than one-fifth, and Mackreth had ſold it, according to the then market-price, at 40,000 l. or even ſo low as 30,000 l. would it not be equally true, that he ought to be decreed to pay 50,000 l. for the ſum due, in reſpect of what Fox loſt by the fraud of Mackreth? And if you can ever eſtabliſh in a court of equity, that a contract has been fraudulently made, and that a party to that contract has loſt by that fraud, in the common caſe, whatever the conveyance be, the party will have that money to pay.—Therefore his Honour went upon the ground, that the value of the eſtate at the time of the ſale was 50,000 l. that Mr. Fox was conſequently cheated, and, the contract being to be ſet aſide, the ſale made afterwards was a ſale made for him who had in point of equity a right to it. Taking this as the point on which it turns, I wiſh to go through the facts. Fox's diſtreſſes began about four years before he came of age: he had involved himſelf and his friends in annuities upon the harſheſt terms. When he came of age, as a man of honour, he was under a duty of imperfect obligation, to relieve the friends he had involved. In this ſituation, which was obſerved by his friends, before he became of age, a plan was propoſed, to ſell ſuch part of his eſtate as was diſpoſable. When he came of age, he had an eſtate of about 1260 l. a-year, in Surrey, that was an eſtate tail, capable conſequently of being diſpoſed of when the time for cutting off the intail ſhould arrive. He had alſo an eſtate in Yorkſhire, of about 11,000 l. a-year for life, and one in Ireland, for life, of which he was in poſſeſſion of about 6000 l. a-year. His friends had reſorted to a man of character in the profeſſion to conduct the diſpoſal of the Surrey eſtate. On the 23d Auguſt, 1777, no ſteps had been taken, even to get in the amount of the debts, or negociating with the annuitants for an accommodation of their demands; though it muſt occur to every body, that before he came of age would have been the *beſt time for arranging* thoſe contracts, and con-

verſing



verſing with the annuitants about arranging that circumſtance. He came of age in Auguſt, and, upon the 23d of September, it appears he had been introduced to Mackreth; the terms they were then upon were not confidential. Fox applied to Mackreth to raiſe 3000 l. and informed him of his ſituation, and that no ſecurity could be made him, till the next term, when a recovery might be ſuffered. Mackreth then propoſed an annuity at ſix years purchaſe (ſomething near half leſs than the actual value); after that, a man cannot talk of any delicacy without the bars of the court of juſtice. If a court of juſtice is bound to affirm ſuch tranſactions, it is not from its approbation of them, but becauſe it would be impolitic and diſtreſsful to the general affairs of mankind to cut them down. When that ſituation was diſcloſed to Mackreth, a mortgage of that eſtate would have been an effective lien upon it; and the way to have made a ſecurity would have been, to have inſured his life till the end of next Michaelmas Term. Under that ſpecies of contract, the merciful and juſt manner of relieving his diſtreſs would have been, to have advanced the money on ſuch mortgage. On the other hand, it ought to be obſerved that though Mackreth took a different courſe with him, it ſeems to have been (if there is not too much levity in ſaying it) in *the courſe of his buſineſs*, for it is in evidence that Mackreth dealt in this way, on the diſtreſſes of mankind. On the 6th of November a recovery was ſuffered of the Surrey eſtate to Farrer, to ſuch uſes as Fox ſhould direct, but nothing was then done towards getting rid of the debt. On the 24th of December, Fox ſends to borrow a ſum of money; Mackreth lent him 3000 l. and took a mortgage by way of ſecurity. Great pains have been taken to impute great generoſity to Mackreth on this occaſion. I ſee no reaſon to ſay ſo; neither do I ſee that there was at that time any plot; on the contrary, I conſider that as a very fair tranſaction; and it would be an extravagant conjecture for a Court of Juſtice to ſuppoſe that the object of lending him that, was to get the legal eſtate into his hands, to tamper with it afterwards, to the prejudice of Mr. Fox. When once one gets beyond the evidence that is before the Court, there is no end to conjecture. Mackreth then acquieſced with the project of delivering Fox from his diſtreſſes, and induſtriouſly offered himſelf and Dawes as truſtees, for that purpoſe, I do not agree, that, by that, there was any plot to get him into bad hands. There are no better men for truſtees, on ſuch an occaſion, than thoſe who will do the buſineſs. And though Lord Ligonier and Lord Grantham were propoſed on the part of Fox, yet the others, as we

buſineſs, might be quite as proper. When Mackreth propoſed himſelf as a truſtee, I think he meant what he ſaid, and that there was a real act of friendſhip intended, to make the moſt of the eſtate, and to deal to the beſt advantage with the annuitants. An aukward circumſtance is, that himſelf and Dawes were of that number, Mackreth himſelf to the amount of 250l. and Dawes of 600l. a-year; theſe being 850l. and I ſuppoſe there being five or ſix times that quantity on the whole. When he undertook to deal with theſe annuitants at large, and himſelf in the number, he certainly took upon himſelf a very delicate charge. The manner in which he dealt for this annuity, was to conſider the arrears which had been incurred, from the 23d September to the 23d December gone, as due to the annuitant, and then he was to take up that ſum at the original price, ſo that nothing more was to be paid for the annuity but an arrear that had been incurred after the rate of 850l. a-year, which was a little more than 200l. to take up that, and, when he had done ſo, that annuity was to be diſcharged.—I do not approve of that——Who can poſſibly ſuppoſe Mr. Mackreth, recommending himſelf to Mr. Fox as a man who would deal more vigilantly with annuitants than another, and, in the firſt inſtance, allowing the annuity to ſtand for an arrear which had gone only for a quarter, I think he ſhould have conſidered it as a loan from the beginning.——. So of Dawes's ſhare of the annuity, it ſhould have been conſidered as diſcharged on the 24th December: he bought, however, on the part of Mr. Fox, but with his own money. Upon the 16th of January, inſtead of conſidering it as an annuity diſcharged on the 24th of December, he conſiders it as bought up for his own uſe, and therefore he was to continue an annuitant of Fox, after he had bought it of Dawes, to the 16th of January. It is impoſſible to ſay he has not in this gone a little further than that ſpecies of indelicacy which a court will look at; for he ſhall not have the annuity till January, it ſhall be conſidered as diſcharged in December; and yet, from the manner in which he has dealt with the annuitant, in general, it ſeems to me as if he thought this a fair way of dealing between man and man in that market, and I ſhould have thought ſo univerſally, had I not obſerved that in regard to one of the annuities, he has compromiſed it at a lower rate than that; and inſtead of regarding the annuity as due, as to the principal ſum, and the arrears due, which is the manner he charged it in October, 1778, it turns out that he had bought it below that rate, *although he had* charged Fox, in October, *at the rate as if he* had made the bargain fairly with



with the annuitant.—In theſe two inſtances his conduct muſt be reſcinded, and he has acted unfairly in the execution of the truſt he had taken upon him. Mr. Fox, the plaintiff, has therefore the advantage of finding Mr. Mackreth dealing with him reſpecting himſelf, as a man who would ſerve him with fidelity, though he had an intereſt himſelf, and acting unjuſtly in a manner which a court of juſtice muſt reſcind. From hence, till the 16th January, I conſider him as a truſtee, and whatever conſequences ariſe from that relation, muſt belong to this buſineſs. He ſends down an agent (Hampton) to value the eſtate, and he has managed ſo as to prevent the court from looking much at what was done in conſequence of the orders which were given to Hampton. Courts of juſtice are to act temperately; but muſt conſider what is the reſult from the ſeveral parts of a tranſaction. On one ſide it is ſaid that he ſent down the agent to value the eſtate, as meaning to treat himſelf: but I think the fair conſtruction is, that he ſent him in the character of a truſtee. He was beginning to act as ſuch with an intention to ſell the eſtate at the beſt advantage, therefore it was part of the execution of the truſt. Hampton's knowledge was Fox's knowledge. But wherever a truſtee gains intelligence as a truſtee and ſervant to the *ceſtui que truſt*, and conceals the circumſtances he ſo gains knowledge of from the *ceſtui que truſt*, he may have the hands of a Court of Juſtice laid upon him as a fraud. I find myſelf at a loſs as to what paſſed between Mackreth and Hampton; he went down twice; the firſt time he was there a week, the latter time longer; but the reſult of the intelligence he got the ſecond time, could not be of any uſe. The intelligence he got the firſt time, was communicated to Mackreth. In theſe circumſtances he begins to deal with him, and there alſo he remains in the character of a truſtee. Fox had a valuation of the eſtates, by Jackman, not a long one, but ſuch as afforded general terms, ſuch as the naming a groſs value of the eſtates, and the number of years value ſet upon them. This Fox had in his hands, and, with this valuation *in medio* Fox inſiſts that the value of the eſtate is 45,000l. Mackreth reaſons, and aſſerts firſt, that the houſes are valued too high, that he would only give $\frac{14}{20}$ of the value, he offering 14 years purchaſe for them—That he will not give 30 years purchaſe for the land; he will only give 28 or 29 years purchaſe; that he looked upon the valuation of the copyhold part of the Horſely eſtate as much too high. He argues upon them, and haggles Fox down, till, either from conviction, or from the conſideration of his circumſtances, they meet at 39,000l. The queſtion ariſing on

is, whether the character of truſtee ſhall vary Mackreth from a ſtranger; for it is not argued that in the caſe of a ſtranger treating in the ſame manner, the tranſaction muſt be cut down. If a truſtee treats with a ſtranger as a truſtee for himſelf, ever ſo fairly, the vendee would be a truſtee for the firſt *ceſtui que truſt*, and the Court will not conſider whether the conſideration was fair or not, which muſt be by reaſon of the confidence which the accident of their relation introduced; then the queſtion is, whether I can find, as a juryman, that Fox agreed to the propoſal in confidence of Mackreth's knowledge and integrity. If a ſtranger had ſaid to Fox, I will deal fairly with you, and, afterwards, miſrepreſented the value, I ſhould hold that to be an abuſe of a confidence which he was bound to obſerve. Was that the caſe here? I confeſs I am in doubt; I do not ſee that I have facts from which to draw that inference. But if Mackreth had not the character of truſtee, he might retain that of confidential friend. I am at a loſs to find that. They ſeem to have dealt as men uſually do, each endeavouring to repreſent the caſe as makes beſt for his own intereſt. There are two facts to be ſettled: firſt, what was the real value: nobody will think Mackreth's criticiſms on Jackman's valuation unnatural or unfair. There is evidence that Jackman would have given, the money at which he eſtimated the eſtate, if he had had it; that it was ſold to Page for more, which is ſtrong evidence to ſhew that the value was more. Suppoſe it to be allowed, that the real value was what Page paid; let us ſee what followed: on the 16th of January, Garforth put the agreement into writing, and it was ſigned by both parties. This ſtruck me as ſhewing an eagerneſs to have the matter fixed; but, from the evidence, it appears that the article for the ſale was not entered into till the day after, when they carried it to one degree more of formality. It ſtands upon the articles till the 24th of April. In the mean time, Mackreth had ſold the eſtate. No man of delicate honour would have carried the contract into execution on the 24th of April, after he had ſold the eſtate on the 20th of March, and have kept that tranſaction a ſecret. He was obliged, by every call of honour, to conſider himſelf as a truſtee; but I fear that if I ſhould lay down the rule, that the court will compel whatever a man of ſtrict honour would do, I ſhould go too far, and might lay down a rule which would be inconvenient in other caſes. Obſervations are made on the note given by Mackreth to Fox; it was an accountable receipt, bearing 5 *per cent.* intereſt. Fox had not the money. I think this, as Mackreth was to *apply it in the payment of* annuitants, was fair. The ſecurity,



curity, being only that of an equitable lien, does not afford any inference of fraud being intended; and, in fact, the money has been paid. The method of making up the account has been urged as a mark of confidence. It is true, it is so; but the queſtion is, whether it was a confidence that he would give him a fair value. As to the confirmations, they follow ſo naturally from the occaſions, that they cannot be ſaid to have been ſought for by way of obtaining confirmations.—With regard to confirmations, they have been conſidered different ways. In Cheſterfield *v.* Janſſen, it turned upon Spenſer doing the acts with his eyes open.—There he ſtood liable to the former bond; but there is another way in which confirmations operate, that the party looks upon himſelf to have been dealt fairly with. In January, Fox did not conſider himſelf as having had an unfair advantage taken of him. In that view it goes further, for there was no complaint till 1781. It is fair to infer, that ſo large a difference of value was not expected in ſo long a time. When would a tranſaction of this ſort be at an end, if not after three years? And it would have laſted in the ſame way till 1800, had not the diſcovery been made of the ſubſequent ſale. It goes much to the queſtion of the real value, that it could not be fixed till a ſubſequent ſale. If the price paid by Page was accidental, no man could argue from that to there being a fraud in Mackreth. It muſt be aſcertained what was the real value of the eſtate at the time of the ſale. Evidence of this has been given only on one ſide, Mackreth having been adviſed to ſhew that contract, which leads to a conſideration how far it would be conducive to the queſtion to have that part further enquired into; it would put an end to the queſtion on one ſide, on the other it would leave it open. I have been deſirous of ſtating my doubts, becauſe poſſibly I may think it neceſſary to have this undergo a further conſideration. After converſing with his Honour, and near half the Judges, a doubtfulneſs and difference of opinion has ariſen as to the policy of laying down the rule, either of law or evidence to the extent now contended for I own I heſitate to lay down any ſuch rule on the ſubject. It is of no uſe to lay down the rule of law, if the rule of evidence is left indefinite. Two ways have ſtruck me; one, to let this matter go to a further enquiry; the other, to which I have been more inclined, to have it re-heard, with the aſſiſtance of thoſe who will furniſh me with the means of laying down the rule which may ſet men at eaſe for their property, that, when they obſerve a tranſaction for the *ſale of an eſtate* cut down for inadequacy of value, after it

has been affirmed by conveyances, and acquieſced in for three years and a half, I may know how I can ſtate ſuch a caſe as mankind ſhall underſtand, without putting them in fear with reſpect to the regulation of their property.

The Lord Chancellor on a following day ſaid:—I have conſidered of the caſe of Fox *v.* Mackreth, and have examined it very much; I have read over all the arguments; my opinion is not varied ſince I ſpoke of it at large; I cannot ſee that the decree is wrong, and therefore it muſt be Affirmed.

But the defendant has appealed to Parliament.

GOODRIGHT *on the Demiſe of* HALL *againſt* RICHARDSON.

This was an ejectment tried in Surrey, where a verdict was found for the leſſor of the plaintiff, ſubject to the opinion of the Court; and the queſtion was, whether a leaſe granted of the premiſes "*for and during the full end and term* "*of three, ſix, or nine years*, from the Feaſt of St. Thomas "next enſuing the date, and to be fully complete and ended "on the ſaid Feaſt of St. Thomas, *which ſhall be determinable* "*in the years* 1788, 1791, 1794," is to be conſidered as a leaſe for *nine* years, determinable on proper notice at the end of three and ſix years.

It was argued for the plaintiff, that *certainty* was eſſential to the exiſtence of every Term; and though this leaſe was good as to the firſt three years, it was void for the reſt, from the uncertainty. And Lord Mansfield, in the Caſe of *Ferguſon* and *Corniſh* *, which was the caſe of a leaſe for ſeven, fourteen, or twenty-one years, ſaid it was a good leaſe for the ſeven years, whatever might be the validity of the two eventual terms.

LORD KENYON, C. J.—There is no doubt of what Lord Mansfield's opinion would have been in *Ferguſon* v. *Corniſh*, as to the validity of the leaſe, beyond the firſt ſeven years. In theſe caſes, the intention of the parties ought to prevail, if it be not contrary to law. It is true that there muſt be a certainty in the leaſe, as to the commencement and duration of the term: but that certainty need not be aſcertained at the time; for if in the fluxion of time a day will arrive which will make it certain, that is ſufficient. As if a leaſe be granted for twenty-one years after three lives in being; though it is uncertain at firſt when that term will

* (*Burroughs*, 1034.)

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commence, becauſe thoſe lives are in being; yet, when they die, it is reduced to a certainty; and *id certum eſt quod certum reddi poteſt:* and ſuch terms are frequently created for raiſing portions for younger children. Now in this caſe, it is impoſſible to form any doubt reſpecting the intention of theſe parties. It was intended that this leaſe ſhould take effect for three years, at all events; and that it ſhould be in the election of either of the parties to put an end to it at that time, or at the end of ſix years, giving reaſonable notice to the other. It is like a leaſe for a year, and ſo from year to year; where, if the leſſee wiſh to determine it at the end of the year, he muſt give reaſonable notice to the other party. And though here either of the parties might have determined the leaſe at the expiration of the firſt three years, yet when the time elapſed, at which notice ought to have been given for that purpoſe, the leaſe could not be determined till the end of the next three years. Conſequently, the leſſor of the plaintiff is not entitled to recover.

ASHHURST, J.—All that is required is either that the term ſhould be certain in itſelf, or reducible to a certainty. Now that is the caſe here; for it is for three, ſix, or nine years, as the caſe may happen; the parties having agreed that it ſhould be determinable in the years 1788, 1791, 1794. It is therefore a leaſe for three years certain, or for ſix, or nine years, unleſs the parties determine it ſooner.

BULLER, J.—This is a leaſe for nine years, determinable by either of the parties at the end of the firſt three or ſix years; for it is ſtated in the caſe that it is *determinable in the years* 1788, 1791 1794. But if it were not determined at either of thoſe periods, the party firſt giving reaſonable notice, it was to continue for the nine years.

GROSE, J.—Of the ſame opinion.

Poſtea to the defendant.

ELLIS *again ſt* HUNT, *and alſo againſt* DAWES, *Aſſignee of* MOORE, *a Bankrupt.*

This was an action of trover, in which a verdict had been taken for the plaintiff, ſubject to the opinion of the Court; the Caſe was:

Moore, before the bankruptcy, ordered goods from the plaintiff at Sheffield; the goods were ſent by the carrier, and arrived at the carrier's inn in London, two days after Moore became bankrupt; on their arrival there, the goods were attached by proceſs of foreign attachment, out of the Mayor's Court *of London,* by a creditor of the bankrupt. The Meſſenger

of the Commiſſioners, two days after, demanded the goods of the carrier, and put his mark upon them, but did not take them away. The plaintiff, then hearing of the bankruptcy, wrote to the carrier not to deliver the goods to the bankrupt, and, ſoon after, made a formal demand of them. The carrier refuſed to deliver them to the plaintiff, and afterwards, on the attachment being withdrawn, gave them up to the aſſignees of Moore.

It was contended, on the part of the plaintiff, that in caſe of inſolvency, the conſignor has a right to ſtop goods any time before they get into actual poſſeſſion; that the letter to the carrier was a countermand of the delivery, and the bankruptcy is of itſelf a countermand, and theſe goods were never once out of the poſſeſſion of the carrier.

LORD KENYON, C. J.—If any caſe had been decided to the extent of the plaintiff's argument, namely, that bankruptcy is of itſelf a countermand, the plaintiffs here would be entitled to recover: but that has never yet been decided. The doctrine of ſtopping goods *in tranſitu* is bottomed on the caſe of Snee *v.* Preſcot, where Lord Hardwicke eſtabliſhed a very wiſe rule, that the vendor might reſume the poſſeſſion of goods conſigned to the vendee before delivery, in caſe of the bankruptcy of the vendee: on this all the other caſes are founded. There have indeed been caſes, where nice diſtinctions have been taken on the fact, whether the goods had or had not got into the poſſeſſion of the vendee; but they all profeſs to go on the ground of the goods being *in tranſitu*, when they were ſtopped. As to the neceſſity of the goods coming to the "corporal touch" of the bankrupt; that is merely a figurative expreſſion, and has never been literally adhered to. For there may be an actual delivery of the goods, without the bankrupt's ſeeing them; as a delivery of the key of the vendor's warehouſe to the purchaſer. In order to decide this caſe, it is material to attend to the dates; on the 24th of November, the proviſional aſſignment was made to Wells, who, on the ſame day, demanded the goods in queſtion of the defendant Hunt, *and put his mark on the caſk*. Now it is ſaid that this ſhould have been done by the bankrupt himſelf; but by the aſſignment he was ſtripped of all his property, which was then veſted in the proviſional aſſignee. Therefore, if a corporal touch were neceſſary to defeat the right of the vendors, it took place here. It is true that the proviſional aſſignee did not alter the ſituation of the goods; but they were then arrived at the end of their deſtined journey, and depoſited in a place where they would have *remained* till the bankrupt could have



have carried them to a warehouſe of his own. All this happened on the 24th of November; and it was not until the 28th of that month that the vendor wrote to countermand the delivery of the goods: but that was too late; for the goods were no longer *in tranſitu*; they were then in the poſſeſſion of the party to whom they were conſigned, or of thoſe who repreſented him. In caſes of this ſort, we cannot but feel for the ſituation of the manufacturer; but it is ſuch as they are neceſſarily ſubject to from their mode of dealing: however, the ſeverity of the caſe cannot induce us to break through the rule of law.

ASHHURST, J.—The leaning of my mind would be in favour of the plaintiff; but the law will not allow him to be in a better ſituation than the reſt of the bankrupt's creditors. The general rule is, that the conſignor has a right to ſtop the goods, if he can, before they get into the actual poſſeſſion of the bankrupt. But here, before the plaintiffs thought of countermanding the goods in queſtion, the proviſional aſſignee, who then ſtood in the place of the bankrupt, had actually taken poſſeſſion of them, and put his mark on them.

BULLER, J.—I am not diſpoſed to diſturb or to leſſen the authority of any of the caſes that have been decided on this ſubject: but none of them could juſtify the vendor in this caſe in taking back the goods. In the former caſes, the line has been preciſely drawn; and they all turn on the queſtion, whether or not there had been an *actual* delivery to the bankrupt. It is of the utmoſt importance to adhere to that line; for if we break through it, we ſhall endanger the authority of the caſes that have been already decided, and ſhall fritter away the rule entirely. In one of the caſes cited, Lord Mansfield took the diſtinction between an *actual* and a *conſtructive* delivery to the vendee. There may be caſes where, as between the buyer and ſeller, if no bankruptcy or inſolvency happen, the goods are conſidered in the poſſeſſion of the buyer the inſtant they go out of the poſſeſſion of the vendor: as if A. order goods from B. to be ſent by a particular carrier at his own riſk, the delivery to the carrier is a delivery to the vendee to every other purpoſe; but ſtill, if he become a bankrupt before the carrier actually deliver them to him, I ſhould hold that the vendor might ſeize them; becauſe that is only a *conſtructive delivery* to the vendee: but an *actual delivery* is neceſſary to deveſt the vendor's right of ſtopping the goods *in tranſitu*. It is clear that bankruptcy itſelf does not put an end to the contract; and if not, the right of the vendor to ſeize goods *in tranſitu* is *founded only* on equitable principles. It is a right, with

which he is indulged on principles of juſtice, originally eſtabliſhed in courts of equity, and ſince adopted in courts of law. But, in order to avail himſelf of it, he muſt ſtop the goods before they get into the *actual* poſſeſſion of the vendee. But in this caſe there is the ſtrongeſt evidence of the conſignee's taking actual poſſeſſion of the goods, by his aſſignee putting his mark on them. It was ſaid by the plaintiff's counſel, that the carrier would have been liable in an action by the vendor: but he would not have been liable in the character of carrier, for the goods had got to the end of their deſtined journey; but he would have been liable only as a warehouſe-keeper, in reſpect of the recompence which he was to receive for warehouſe-room. But the inſtant the proviſional aſſignee put his mark on the goods, the warehouſe-man became the agent or ſervant to the bankrupt.

GROSE, J.—The general rule is perfectly clear that the conſignor may ſeize the goods *in tranſitu*, in caſe of the inſolvency of the conſignee, before they actually reach him. The queſtion therefore here is, whether, on the facts of this caſe, the goods were, or were not, *in tranſitu*, when the plaintiffs wrote to countermand the delivery of them. Now it is ſtated as a fact, that before this letter arrived, the proviſional aſſignee had put his mark upon the caſk; and this diſtinguiſhes it from the caſes cited. When the goods were marked, they were delivered to the conſignee as far as the circumſtances of the caſe would permit; the aſſignee could not then take them away, becauſe they were at that time under an attachment. After the mark was put on them, they were no longer *in tranſitu*; and conſequently the plaintiff's right to ſeize them was deveſted.

Poſtea to the defendants.

THE KING, v. IRELAND.

The ſtatute 5 W. and M. cap. 11. § 3. enacts, that if a defendant removing an indictment by *certiorari* into the Court of King's Bench, ſhall be convicted thereon, the Court ſhall give coſts to the proſecutor; who, for the recovery of ſuch coſts, ſhall, *within ten days* after demand made, and refuſal of payment by the defendant, have an attachment againſt him. The queſtion in the preſent caſe was, Whether the ten days muſt elapſe before the attachment can be granted, or whether the proſecutor is entitled to it immediately after demand and refuſal.



THE COURT ſaid, the ſtatute muſt be conſtrued to mean that ten days muſt elapſe after the demand made before an attachment be granted; otherwiſe the indulgence which the Legiſlature appears to hold out, could not exiſt.

Attachment refuſed.

BIGGS *and others*, *v.* LAWRENCE.

This was a rule to ſhew cauſe why there ſhould not be a new trial. *Buller*, J. who tried the cauſe in *Cornwall*, reported that the action was for goods ſold and delivered; the plaintiffs were partners, one of whom lived in *Guernſey*, the reſt in England. The defendant, who lived in Cornwall, ſent an order to the partner in Guernſey, for ſome brandy to be delivered to *Wood*, the maſter of a ſmuggling-veſſel; and the goods were delivered in ſmall caſks fit for ſmuggling. Two queſtions aroſe on the trial:

1ſt. Whether Wood's written receipt for the goods was evidence of the delivery to the defendant.

2dly, Whether the plaintiffs could recover in this action, they being ſubjects of this country, and the contract made in contravention of the laws, namely with a view of ſmuggling the goods into England. Upon this ground, the plaintiffs were nonſuited.

It was now contended in favour of the rule, that the contract being completed in Guernſey, where ſuch a contract was not illegal, brought it within the caſe of *Holman* v. *Johnſon*, Cowp. 341.

And that the ſubſequent uſe made of the tranſaction will not affect the original contract, according to the caſe of *Robinſon* v. *Bland*, 2 Burroughs, 1077.

LORD KENYON, C. J.—If the deciſion of this caſe had the leaſt tendency to overturn that of *Holman* v. *Johnſon*, I ſhould certainly pauſe a little before I gave any opinion which might ſhake it. But I wiſh to leave the authority of that caſe unqueſtioned, becauſe I approve of it. To the caſe of *Robinſon* and *Bland* I alſo give my aſſent. The former of thoſe caſes was on a contract entered into by foreigners, bound by no allegiance to this country: and the latter was a contract made in France, which, being warranted both by the laws of that country and this, was carried into execution here. But in this caſe it is admitted, and the plaintiff's counſel was obliged to make the admiſſion, that this muſt be conſidered as a contract made in England. But it has been inſiſted that no adjudged caſe is to be *found*, *in* which it has been determined that perſons, trading

ing in the ſituation of theſe plaintiffs, ſhall not recover. But ſimilar caſes have frequently occurred at *niſi prius*; and the reaſon why no ſolemn deciſions are to be met with on the ſubject is, becauſe the *niſi prius* determinations were thought too clear to be queſtioned. Where a contract is made for ſmuggled goods, a party cannot come into a court of juſtice to recover on it. A perſon ſuing in a court of law, muſt diſcloſe a fair tranſaction; and it muſt not appear, from his own ſhewing at leaſt, that he has infringed the laws of his country. Now here three of the plaintiffs lived in England; and it is clear that they knew, either perſonally, or (which is the ſame) by their agent, the other partner living at Guernſey, that the contract, which they had entered into, was made in direct contravention of the laws of their country; for the goods came under more than ſuſpicious circumſtances, ſince they were ſent in ſlings, and half ankers, ready for ſmuggling: and it requires much argument to convince me that a contract thus made can be carried into execution in England. There is no *dictum* in favour of the plaintiff's right of action; and the whole ſtring of caſes, by analogy, is againſt it. Therefore I am of opinion that the non-ſuit ought to ſtand.

ASHHURST, J.—I form my opinion on this circumſtance, that three of the plaintiffs lived in England; and therefore though the partner, with whom the contract was made, lived abroad, this caſe muſt be conſidered in the ſame light as if all the partners lived here. It is not neceſſary to determine whether a perſon, who ſells goods in England, which are afterwards to be applied to an illegal purpoſe, can recover the price of them here. For, in this caſe, the goods were ſold and delivered, not in England, but in Guernſey, and packed too in ſuch a manner as to ſhew that they were intended for the purpoſe of ſmuggling. The plaintiffs were agents to the very act of ſmuggling; they were *participes criminis*, and therefore cannot avail themſelves of the laws of this country in order to enforce a contract made in direct oppoſition to them.

BULLER, J.—This caſe muſt be conſidered as if it were a contract made between the plaintiffs and the defendant, all reſiding in this country, for the delivery of goods in Guernſey, for the purpoſe of ſmuggling them into England. And I uſe the latter expreſſion becauſe it is clear, from the manner in which they were packed at the time when they were delivered, that they were intended to be ſmuggled: that was the act of the plaintiffs. And I cannot ſay in a Court of Juſtice, that the *plaintiffs, ſo offending againſt the law of*



the land, ſhall be permitted to recover on ſuch a contract. None of the caſes cited apply to the preſent. That of *Holman* v. *Johnſon*, went on the ground of the plaintiffs being foreigners, which materially diſtinguiſhes it from this; becauſe the ſubjects of one country reſiding there are not bound to take notice of the revenue laws of any other. That maxim has been long ſince adopted here, and recognized by Lord Mansfield in *Holman* and *Johnſon*. But this is the caſe of one of the king's ſubjects making a contract directly againſt the ſtatute laws of this country. Neither has the caſe of *Petrie* v. *Hannay* any relation to the preſent: here the contract, on which the action is founded, is illegal; which was not ſo there. And in order to make this caſe like that, it is neceſſary to ſhew that theſe plaintiffs were not concerned in the original tranſaction, but afterwards paid money for the uſe of the defendant, which they wiſhed to recover back; for there the money was paid to a perſon, who was not a partner in the original tranſaction; and the action was founded on the ſubſequent contract, and not on the ſtock-jobbing tranſaction.

GROSE, J. of the ſame opinion.

Mr. J. BULLER then ſaid, that another objection had been made at the trial, that the plaintiffs ought not to be nonſuited, and that it ſhould have been left to the jury to conſider whether the plaintiffs knew the goods were to be ſmuggled; but that he had been of opinion that, as the counſel on both ſides had fully argued the queſtion of law on the admiſſion of facts, the plaintiffs ought not to be at liberty to go to the jury on the ſame facts, when they found his opinion againſt them in point of law; to which the Court aſſented.

Rule diſcharged.

SOUTHALL, *v.* LEADBETTER.

This was a replevin for rent; and the action was brought with a view of trying the ſingle queſtion, whether the leſſee of a repairing leaſe for 21 years, of a houſe at a peppercorn rent for the firſt half year, and at a rack-rent for the remaining term, having afterwards aſſigned his leaſe for a ſmall *premium*, was liable to pay the moiety of the expence of a party-wall between this houſe and one adjoining, which wall was re-built by virtue of the ſtatute of the 14th Geo. III. cap. 78, § 41; or whether the landlord who granted the leaſe is bound to pay the ſame.

The

The Jury found a verdict for the plaintiff, ſubject to the opinion of the Court on the queſtion above-mentioned. The words of the ſtatute are, "that the owner who ſhall be "intitled to *the improved rent* of the adjoining building ſhall "pay a proportion of the expence of rebuilding any party-"wall."

LORD KENYON, C. J.—The *improved rent* mentioned in this Act of Parliament ſtands contra-diſtinguiſhed from *ſome other rent*; but here no other rent was reſerved but that at the granting of the leaſe. But it is ſaid that the leſſee received from his aſſignee *a ſum in groſs*, as the conſideration for the purchaſe, which is equivalent to an *improved rent*: if indeed a large ſum were paid for the purchaſe of a leaſe, though no improved rent were reſerved to the original leſſee, I think he would be liable to pay this expence within the act of parliament. But that is not the preſent caſe. For when Winter, the landlord, granted this leaſe, he reſerved the beſt rent which could be procured for it at that time, ſince this rent exceeds the rent formerly reſerved by 10 l. *per annum*, and the whole of the land-tax; and the caſe ought not to be varied by the circumſtance of the eſtate's gradually increaſing in a ſmall degree. Where the parties contract for a leaſe at rack-rent, the landlord is the perſon who ought to bear the expence of the party wall. Then it was contended that the full rent was not reſerved originally, becauſe it was ſtipulated that the tenant ſhould lay out a conſiderable ſum of money in improving the eſtate; but it muſt alſo be remembered that, in conſideration of that, the leſſee was to pay no rent for the firſt half year; which might have been conſidered at the time as commenſurate with the ſum to be laid out in the repairs. Neither is the leſſee concluded by the covenant to pay the taxes, aſſeſſments, impoſitions, &c. for that only extends to the *land-tax*, and all other taxes *ejuſdem generis*: but this is not a tax. Therefore the plaintiff in replevin is entitled to judgment, becauſe he has overpaid the rent diſtrained for.

ASHHURST, J.—The Legiſlature intended to throw this burden on the leſſees of building leaſes, by whom the value of the eſtates is conſiderably improved, and who afterwards make under leaſes, reſerving improved rents. But here it does not appear that any greater rent was reſerved to the firſt leſſee than there was at the time of granting the leaſe.

BULLER, J.—The caſe which the Legiſlature had in view was where a ſmall ſum is reſerved, as a ground-rent, on a long building leaſe; and the leſſee, in conſequence of the improvement, underlets, *reſerving* an improved rent. But here



here the plaintiff and defendant ſtand in the relation of landlord and tenant; and in *Stone* v. *Greenwell*, Lord Mansfield ſaid, as the parties ſtood in the relation of landlord and tenant, the former was liable, under this Act of Parliament, to pay this expence.

GROSE, J.—It does not appear to me that the ſtatute is merely confined to building leaſes; the words of the act are ſo framed as to comprehend other caſes. The ſtatute ſays, that the owner of the *improved rent* ſhall pay: but in this caſe there is only *one* rent reſerved, and that is payable to Winter; he therefore is liable to pay this expence.

Poſtea to the plaintiff.

WRIGHT *on the Demiſe of* ANNE BURRIL *and* MARY BURRIL, *v.* KEMP.

On trial of an ejectment at the laſt York Aſſizes, a verdict was taken for the plaintiff, ſubject to the opinion of the Court on the following

CASE.

Samuel Burril, who was ſeiſed in fee according to the cuſtom of the manor of Skipſea of the eſtate in queſtion, on 1ſt of February, 1743, made a voluntary ſurrender of it to the uſe of himſelf for life, and from and after his deceaſe to the uſe of Elizabeth his wife during her widowhood; and after his deceaſe, and upon the marriage of Elizabeth, then to the uſe and behoof of William Wallis, ſon to Elizabeth, for his natural life; and from and after his deceaſe to the uſe of the iſſue of his body lawfully to be begotten; with a proviſo that *in caſe William Wallis ſhould die in the life-time of the ſurrenderor*, or *without iſſue of his body, then and thereupon* all the ſurrendered *premiſes ſhould go to the right heirs of the ſurrenderor* for ever. W. Wallis was the natural ſon of S. Burril by E. Wallis, whom he afterwards married; and he and Elizabeth Burril both died in the life-time of the ſurrenderor; William Wallis left iſſue, the leſſors of the plaintiff, who have been admitted tenants; and he bequeathed the tuition and guardianſhip of the perſons and eſtates of the leſſors of the plaintiff to his brother, J. Burril, by will dated 25th of April, 1767, and died in the ſame year. S. Burril died the 3d of April, 1774. John, who was the eldeſt legitimate ſon of his father Samuel, was admitted tenant of the premiſes, as heir to his father, on *the 15th of May*, 1775; under whom the defendant claims

as a purchaſer for a valuable conſideration, though with notice of the claim by Wallis's children, under the ſurrender in February, 1743, and he has been alſo admitted.

LORD KENYON, C. J.—The queſtions here are, what was the intention of the parties to the ſurrender, whether they have expreſſed it in legal terms; and if ſo, whether any rule of law will be violated in giving effect to it? There is no doubt but that a ſurrender is conſidered as a common law conveyance, and is not entitled to the ſame favourable conſtruction as a will. And therefore, unleſs the ſurrenderor in this caſe has uſed the language which will confer a legal eſtate, it cannot be conferred. In deeds, certain legal phraſes muſt be uſed, in order to create certain eſtates; as the word "heirs" to create a fee; and "heirs of the body" to create an eſtate in tail. But beyond that I would ſay, with Lord Hardwicke, that there is no magic in particular words, further than as they ſhew the intention of the parties. Now here it is impoſſible to entertain any doubt: S. Burril ſurrendered the eſtate to the uſe of himſelf for life, then to his wife during her widowhood; *then*, that is, in caſe her eſtate for life is put an end to by doing this act, which he meant to guard againſt, to his ſon W. Wallis for life, and after his deceaſe to the iſſue of his body. Therefore I cannot accede to what was ſaid by the defendant's counſel, that this was a contingent remainder in W. Wallis; for it was veſted: though I cautiouſly avoid ſaying what the limitation to his iſſue is. The ſurrender then proceeds to ſtate a proviſo, that, in caſe W. Wallis ſhould die in the life-time of the ſurrenderor, *or* without iſſue of his body, the eſtate ſhould go to the right heirs of the ſurrenderor: and here the queſtion ariſes on the word "*or*." Now there is no doubt on the intention of the parties: and where ſenſe requires it, there are many caſes to ſhew that we may conſtrue the word *or* into *and*, and *and* into *or*, 2 *Str.* 1175. and 3 *Atk.* 390, in order to effectuate the intent of the parties. Here, therefore, in order to give effect to the intention of the ſurrenderor, we muſt ſay, that, when he uſed the word *or*, he meant *and*. And there is no caſe, in which any difference has been made, as to this point, between a will and a deed; when the Court are conſidering how the intention of the parties can be effected. Then, without deciding what intereſt the leſſors of the plaintiff have, at all events they have a ſufficient title to maintain this ejectment.

ASHHURST, J—The intention of the ſurrenderor muſt prevail, unleſs it be contrary to any rule of law. We muſt

collect

collect the intention of the parties in deeds as well as in wills; to give effect to which the word *or* may in both cases be equally construed into *and*.

BULLER, J.—In addition to the cases mentioned by my Lord, there is another to the same effect in *Moor* 422, where the words are, "if he die without issue *or* before 21, then over." The manifest intention of the surrenderor was to reserve a life-estate to himself, then to his widow, during her widowhood, and then to his son W. Wallis and his issue: then the limitations must be moulded if possible, to answer that intent.

GROSE, J.—There was also a like case of *Gubb* v. *Gubb*, arising on a devise which came from Exeter; and, on a motion for a new trial, it was given up as a settled point.

Postea to the plaintiff.

DOE *on the Demise of* HELEN COMBERBACH *and others*, v. PERRYN, KNT.

A verdict on this ejectment was taken for the plaintiff, subject to the opinion of the Court on the following

CASE.

James Comberbach, being seised in fee, by will, dated the 21st of May, 1736, (after bequeathing a leasehold estate to R. Perryn, during his term and interest therein, and all his personal estate in the manner therein mentioned,) devised the premises in question to his niece Dor. Comberbach, wife of his nephew James Comberbach, for life, for her separate use, with a power of leasing for any term not exceeding seven years in possession, reserving the most improved rent; remainder to trustees to preserve contingent remainders, remainder to all and every the children of Dor. Comberbach, begotten, or to be begotten, on her body by his nephew James Comberbach, and their heirs for ever, to be equally divided between and among such children (if more than one) share and share alike; but if only one child, then to such only child and his or her heirs for ever,; and for default of such issue to James Comberbach for life, with power of leasing as before; remainder to trustees to preserve contingent remainders, and from and after the decease of the survivor of James Comberbach and Dor. his wife, without issue as aforesaid, to and among all and every the children of his nephew Roger Comberbach, and of B. Perryn, respectively begotten, or to be begotten by them, on the

the body or bodies of their reſpective wives, and to his niece Eliz. Adams, and to the heirs of ſuch children of E. Adams reſpectively, in manner following; namely, one-third part or ſhare thereof (the ſame to be divided into three equal ſhares or parts) to the child or children of his nephew R. Comberbach, who ſhould be living at his [the deviſor's] deceaſe; and, if more than one, to be divided among them equally ſhare and ſhare alike, and to the heirs of ſuch child and children reſpectively; one other third part thereof to the child and children of his nephew B. Perryn, and who ſhould be living at the time of his [the deviſor's] deceaſe, and to be divided among them (if more than one) ſhare and ſhare alike, and to the reſpective heirs of ſuch child and children of the ſaid B. Perryn; and the other remaining third part to his niece Eliz. Adams, and the heirs of her body lawfully to be begotten; remainder to his own right heirs for ever; with like power of leaſing to R. Comberbach and B. Perryn during the minority of their children, and to Eliz. Adams reſpectively, as they ſhould be in actual poſſeſſion, as was before given to Dorothy Comberbach; remainder to his own right heirs for ever. The will alſo contained a deviſe of other premiſes ſpecifically, and of all other the real eſtate of the deviſor to his nephew J. Adams for life; remainder to truſtees to preſerve contingent remainders; remainder to all and every the children of James Adams, equally to be divided between them (if more than one) ſhare and ſhare alike, and to their heirs reſpectively; but if only one, then to ſuch only child, and to his or her heirs; and for default of ſuch iſſue to and among all and every the children of his nephews R. Comberbach and B. Perryn, by their reſpective wives, and to his niece Eliz. Adams, and to the heirs of R. Comberbach's and B. Perryn's children, and his niece Eliz. Adams reſpectively, in manner following; one third part to the child and children of R. Comberbach, who ſhould be living at the time of his [the deviſor's] deceaſe, and to the heirs of ſuch child and children reſpectively; one other third part to the child and children of B. Perryn who ſhould be living at the time of his [the deviſor's] deceaſe, and to the reſpective heirs of ſuch child and children of B. Perryn, and the remaining other third part to Elizabeth Adams, and *the heirs of her body* lawfully to be begotten; remainder to the deviſor's right heirs for ever; with ſimilar powers of leaſing to James Adams, when in poſſeſſion, and to R. Comberbach and B. Perryn during the minority of their children reſpectively, and to Elizabeth Adams, when they ſhould reſpectively come



come into poſſeſſion; and a deviſe of the reſidue and remainder of his eſtate real and perſonal to R. Comberbach, B. Perryn, and Elizabeth Adams, ſhare and ſhare alike.

The deviſor died in 1737, leaving Roger Comberbach his nephew, and heir at law; who was alſo the heir at law of J. Comberbach and of the children of James and Dorothy Comberbach; and under him the leſſors of the plaintiff claim. James Comberbach and Dorothy his wife were married in the life-time of the deviſor, but had not any iſſue at the time of his death: though in 1739 they had a daughter, who died in 1740; and in 1741 another daughter, who died in 1761, without iſſue; and a ſon in 1742, who died in 1761, without iſſue. James Comberbach died in 1784, and Dorothy in 1786. Elizabeth Adams died ſoon after the deviſor, without having been married, and without doing any act to deſtroy the eſtate-tail limited to her by the will. The defendant claimed as one of the children of B. Perryn.

This ejectment was defended only for an undivided third part of the eſtates deviſed by James Comberbach to Dorothy Comberbach, with the remainders over in the will. And the queſtion reſerved for the opinion of the Court was, whether the plaintiff was entitled to recover that third part.

LORD KENYON, C. J.---After ſtating the will, and obſerving that the ſecond remainder to the right heirs of the deviſor had no meaning, proceeded thus; The grounds on which this caſe has been argued on the part of the defendant, are thoſe on which we proceed in giving our judgment, namely, what is the general intention of the deviſor, and whether he has uſed words ſufficient in law to carry that intent into execution. In doing this, we are not to proceed on conjecture, but on the words of the will; from the whole of which we are to endeavour to extract the fair meaning. There is no doubt but that legal formal words may be controlled by the context of the will; but we ought not to reject the legal meaning of thoſe words, unleſs we are clear that, in ſo doing, we give effect to the deviſor's intention. Two points have been made for the defendant; 1ſt, that the limitation to the children of Dorothy Comberbach only created an *eſtate tail*; and, 2dly, but even if it gave them a *fee*, it was not to veſt in thoſe children on their reſpective births, but to remain in ſuſpenſe till the death of the ſurvivor of James and Dorothy Comberbach. And if the defendant be right in either of theſe points, he is entitled to our judgment.

In the firſt place, then, do theſe words confer an eſtate-tail, or a fee, on Dorothy's children? The words are, "To all and every the children of Dorothy, begotten, or to be begotten, on her body by James Comberbach, *and their heirs* for ever; and *for default of ſuch iſſue*, &c. then over." Now words more emphatical cannot be uſed to create a fee, than "to *A.* and his heirs for ever." Undoubtedly thoſe words may be controlled by ſubſequent ones; and were properly ſo in the caſe of *Ives* v. *Legge*, cited by the defendant's counſel; becauſe there the limitation was to his daughter, and the children of her begotten, and their heirs, and afterwards to a perſon who might by poſſibility have been heir to thoſe children. That ſufficiently explained the intention of the deviſor, becauſe there could not be a failure of heirs general, while the remainder-man, or any of his deſcendants, were living. But that caſe differs from the preſent, becauſe there the limitation over was "in default *thereof*," namely, *heirs*; and here "in default of *iſſue*," which is referable to *children*. And we may expound one part of the will by another: now this deviſor knew what words were proper to convey an eſtate-tail; becauſe, in creating the limitation to Elizabeth Adams, he uſed a form of technical expreſſion peculiar to the creating of an eſtate-tail. And if this expoſition wanted any further argument in aid of it, it may be drawn from the clauſe giving the power of leaſing. The power of leaſing given by the ſtatute to tenants in tail, only continues during the exiſtence of the eſtate-tail, and does not bar the remainder-man or reverſioner. Now here the deviſor intended to give a power of leaſing which ſhould govern the whole eſtate; and therefore, during the infancy of the children of R. Comberbach and of B. Perryn, the power is given to their parents, and to Elizabeth Adams herſelf; but no ſuch power is given to the children of Dorothy, becauſe it was not neceſſary. This ſhews that he intended to give a larger eſtate to Dorothy's children than to the other two ſets of children: but I do not rely much on that minute circumſtance. Then it was ſaid that the children of Dorothy were the primary objects of the deviſor's bounty, and that the other deviſees ſhould not take till there was a failure of thoſe children: but the defendant's conſtruction does not meet that idea; for if they took only an eſtate-tail, and ſome of theſe children had died without iſſue, their ſhares would have gone over to the remainder-man, that is, would have gone away to the reſt of the children, as there is nothing in the deviſe to create croſs remainders between them. Therefore I think it is infinitely [illegible] *for us, in conſtruing* this will, to ſay that theſe words



words only gave an eſtate-tail to Dorothy's children; if we were to ſay ſo, we muſt proceed on conjecture only, againſt the expreſs words of the will.

Then, if they took a fee, is there any thing in the will to limit it to ſuch as were living at the time of the death of the ſurvivor of Dorothy and James? And here I again refer to the language which the deviſor has uſed in other parts of the will. The deviſe to the children of Dorothy is, *to them and to their heirs for ever*: but in other parts of the will, where he intended that the limitations ſhould be confined to ſuch children as were living at any particular time, he uſed expreſs words to that effect. The caſe of *Elſe* v. *Oſborn*, which was cited by the defendant's counſel, does not apply to the preſent; for that only decides that, where there is a limitation to *A.* for life, and afterwards to an uncertain number of perſons who might come *in eſſe*, that remainder ſhall only be veſted in thoſe who are in exiſtence at the determination of the particular eſtate. Then it was ſaid by the defendant, that if the eſtate veſted in a child of Dorothy, born in the deviſor's life-time, the limitations over could not take effect at all: but it is found by the Caſe, that Dorothy had no child, either at the time of making the will, or of the deviſor's death. So that there is nothing to diſtinguiſh this caſe from that cited from Douglas, and that of *Lodington* v. *Kime*. The clear intent of the deviſor was, that the children of Dorothy, if any, ſhould take a fee; and if ſhe had no children, then that the remainders over ſhould take effect: but Dorothy had children, by which the limitations over were defeated. Therefore the title is properly derived to the leſſors of the plaintiff. As to what the deviſor would have ſaid, had he looked to the event of Dorothy's children dying in the life-time of their parents, it is unneceſſary to conſider.

ASHHURST, J.—Wherever a fee is created by poſitive words in a will, it can only be defeated by ſubſequent words equally plain, or by neceſſary implication. The operation of this will is, that the limitation to Dorothy's children was contingent till they were born; but it became veſted on the birth of the firſt child, ſubject however to be diminiſhed in quantity as other children of Dorothy ſhould be born: and, on the birth of Dorothy's firſt child, the ſubſequent limitations were defeated. Then the only queſtion is, whether there is any thing in the will to ſhew that the children of Dorothy muſt neceſſarily be confined to *children living at the time of the deceaſe of their parents*: but no words are uſed in the will, from which ſuch an inference muſt neceſſarily be drawn; and it is clear by the ſubſequent parts that

ſuch had been the deviſor's intention, he knew how to expreſs himſelf.

BULLER, J.—In this will the deviſor has uſed the words *heirs*, *heirs of the body*, *children* and *iſſue*; and having uſed them all, we are bound to ſay that he underſtood the meaning of each; and we cannot ſubſtitute one for the other, unleſs by unavoidable and neceſſary conſtruction in order to make ſenſe of the will. But no ſuch neceſſity exiſts in this caſe. *Children* and *iſſue*, in their natural ſenſe, have the ſame meaning: but not ſo the word "heirs:" and unleſs we are compelled, in order to make ſenſe, to ſay that "children" and "heirs" are ſynonymous, we are bound to ſay that "heirs" do not mean "children." It has been argued from different parts of the will that *heirs* muſt mean *heirs of the body*; becauſe a remainder is limited to the deviſor's right heirs, after the limitation to the children of R. Comberbach and B. Perryn, and their heirs, and to Elizabeth Adams, and the heirs of her body; and that the word *heirs*, in the limitation to Dorothy's children, muſt have the ſame meaning as the word "heirs," in the limitation to the other two ſets of children. But the limitation to the children of R. Comberbach and B. Perryn, and to Elizabeth Adams in tail, is, to them reſpectively *in manner following*, namely, as to two-thirds to the children *and their heirs* generally; and as to the other third part to Elizabeth Adams, and *the heirs of her body*; and the remainder to the deviſor's right heirs muſt mean the remainder expectant on the determination of the eſtate given to Elizabeth Adams in tail; and cannot refer to the other two-thirds, which were given in fee. The remainder to the right heirs of the deviſor, which is given a ſecond time, applies to nothing; it conveys no idea; nor can it explain any other part of the will. In the caſe of *Ives* v. *Legge*, the words, after the firſt limitation, were "in default thereof;" which diſtinguiſh it from the preſent, where the words are "for default of *ſuch iſſue*," which mean the ſame as "for default of *ſuch children*." Then it was contended that the word "*ſuch*" might be rejected: where indeed a word is abſurd and nonſenſical, and cannot be read in the ſenſe in which it is written, we ought to read it in ſuch a manner as to make it intelligible; but the Court cannot reject any word, which has ſenſe in the place where it ſtands. That queſtion was fully diſcuſſed in *Denn d. Briddon* v. *Page*, and another, where the deviſe was to the ſon of T. Naſh for life, remainder to his firſt and other ſons in tail-male, and for default of ſuch iſſue to the daughters of T. Naſh (without words of limi-

ad for default of ſuch iſſue, remainder over; there

it



it was contended that the word *ſuch* ought to be rejected, and then the daughters would take an eſtate-tail; but the anſwer given by the Court was, that they could not ſay that *ſuch* had no meaning, for *daughters* were before named, to whom *ſuch* was referable; and it was held that the daughters only took an eſtate for life. So here the words "ſuch iſſue" are ſenſible if they mean *children*; and therefore the Court cannot reject either of them. Then it was ſaid by the defendant's counſel that the limitation over might take effect, either if Dorothy had no children, or, if ſhe had, if they died in the life-time of their parents. The words "dying without iſſue" have been frequently held to mean "without iſſue *at the time of the death* of the party," in caſes of perſonal property, but not in limitations of freehold eſtates. In *Fonnereau* v. *Fonnereau*, Lord Mansfield aſked whether there was any ſuch determination in the caſe of real property, and the counſel agreeing that there was none, the judgment of the Court in that caſe proceeded upon that ground. The reaſon why this has not been decided in limitations of freehold eſtates is, that courts of law always lean in favour of the veſting of eſtates; and therefore, on ſuch a limitation as the preſent, they have ſaid that the eſtate ſhall veſt on the birth of a child, and without waiting for the death of the parents; which rule is not attended with any inconvenience to the children, becauſe where the eſtate is limited to a number of children, it ſhall veſt in the firſt, and afterwards open for the benefit of thoſe who ſhall be born at a ſubſequent period. But if this were held not to veſt till the death of the parents, this inconvenience would follow, that it would not go to grand-children: for if a child were born, who died in the life-time of his parents, leaving iſſue, ſuch grand-child could not take, which could not be ſuppoſed to be the intention of the deviſor. The caſe of *French* v. *Caddell*, went on a different ground; that was not an executory deviſe, but a deviſe to take effect in poſſeſſion at the deviſor's death; for though the deviſor ſaid "in default of iſſue male and female of his own body," yet the contingency muſt be known at the time of his death. The caſe of *Wellington* v. *Wellington* proceeded on the ſame ground. But the caſe of *Keene* dem. *Pinnock* and wife v. *Dickſon*, is nearly ſimilar to the preſent: there the deviſe was to G. Pinnock for life, remainder to her firſt and other ſons in tail *general, and for default of ſuch iſſue* MALE, remainder over; and it was contended at the bar that the word *male* might be rejected, but the Court ſaid they could not do it, *but held* that the remainder over was a contingent devi*only on the* event of there never being a ſon, and it



were a ſon ever born, though he died, the remainder over was void. In that caſe a ſon was born, who died during the life of G. Pinnock; on the birth of whom, the eſtate veſted in him, and the limitation over was void.

GROSE. J.—added, that he perfectly agreed with the Court in the reaſons given for their judgment, which it was unneceſſary for him to repeat.

Poſtea to the plaintiff.

HAYNE *and another* v. MALTBY.

The plaintiffs were aſſignees of one Taylor, who had obtained a patent for a machine to be uſed in the ſtocking manufactory. The defendants obtained permiſſion to uſe this machine under certain reſtrictions mentioned in articles of agreement entered into between the parties; for a breach of covenant in which articles, this action was brought.

The defendant pleaded, *inter alia*, that the patent was void, in never having been enrolled; that it was not a new invention; and that the patentee was not the inventor.

The plaintiff demurred; and it was contended that the defendant was eſtopped in this action, by his covenant, from pleading in bar that the patent was void: it is not a void conſideration; beſides, a Court of *Law* will not avoid a deed.

LORD KENYON, C. J.—The facts of this caſe are ſhortly theſe: the plaintiffs, pretending to derive a right under a patent, aſſigned to the defendant part of that right on certain terms; and notwithſtanding the facts now diſcloſed ſhew that they have no ſuch privilege, they ſtill inſiſt that the defendant ſhall be bound by his covenant, though the conſideration of it is fraudulent and void. This is not to be conſidered as a covenant to pay a certain ſum in groſs at all events; but to uſe a machine in a particular way, in conſideration of the plaintiffs having conferred that intereſt on the defendant, which they profeſſed to confer by the agreement. Now, in point of conſcience, it is impoſſible that two perſons can entertain different ideas upon the ſubject. But it is ſaid that, though conſcience fails, the defendant is eſtopped in point of law from ſaying that the plaintiffs had no privilege to confer. But the doctrine of eſtoppel is not applicable here. Where indeed an heir apparent, having only the hope of ſucceſſion, conveys, during the life of his anceſtor, an eſtate, which afterwards deſcends upon him, although nothing paſſes at that time, yet when the inheritance deſcends upon him, he is eſtopped to ſay that he had no intereſt at the time *of the grant*: there an eſtoppel is

founded



founded on law, conſcience, and juſtice: but what is the caſe here? Who is eſtopped? The perſon, ſuppoſed to be eſtopped, is the very perſon who has been cheated and impoſed upon. In the caſe of *Oldham* v. *Langmead*, the patentee had conveyed his intereſt in the patent to the plaintiff; and yet, in violation of his contract, he afterwards infringed the plaintiff's right, and then attempted to deny his having had any title to convey: but I was of opinion that he was eſtopped by his own deed, from making that defence. But there is no ſimilarity between that and the preſent caſe. Neither does this reſemble the caſe of landlord and tenant; for the tenant is not, *at all events*, eſtopped to deny the landlord's title; the eſtoppel only exiſts *during the continuance of his occupation:* and if he be ouſted by a title paramount, he may plead it.

ASHHURST, J.—This is a good plea; and the defendant is not eſtopped from diſcloſing any of the matters contained in it. This is not like the caſe of landlord and tenant: as long as the latter enjoys the eſtate, he ſhall not be permitted to deny his landlord's title, for he has a meritorious conſideration; but when he is expelled by a perſon having a ſuperior title, he may plead it. But this is a caſe of a very different kind. The plaintiffs uſe this patent as a fraud on all mankind; and they ſtate it to be an invention of the patentee, when in truth it was no invention of his. The only right conferred on the defendant by this agreement was that of uſing this machine, which was no more than that which he, in common with every other ſubject, has without any grant from the plaintiffs.

BULLER, J.—In the conſtruction of all covenants and agreements, the Court has univerſally conſidered the intention of the parties. Now here the plaintiffs aſſerted that they had an excluſive right to a particular machine; and, if they had, they might convey it to any other perſon. They then came to an agreement with the defendant, by which they covenanted that he ſhould be at liberty to uſe the patent machine, of which they were then in poſſeſſion, provided he would uſe it in the manner therein ſpecified; in conſideration of which, he covenanted not to uſe any other machine. But it is now diſcovered that they had no ſuch right; and therefore the defendant has not the conſideration for which he entered into this covenant; and, notwithſtanding which, they inſiſt that he is ſtill bound. I think that the caſe of landlord and tenant is not unlike this; for the facts in this caſe, diſcloſed by the pleas are equivalent to an eviction.

eviction of the tenant. As long as the tenant holds under the leaſe, he is eſtopped from denying his landlord's title; but when he is evicted, he has a right to ſhew that he does not enjoy that which was the conſideration for his covenant to pay the rent, notwithſtanding he has bound himſelf by the covenant.

GROSE, J.—Declared himſelf of the ſame opinion.

Judgment for the defendant.

CATES *qui tam v.* KNIGHT, and *v.* MELLISH.

This was a Rule to ſhew cauſe why judgment ſhould not be arreſted in the following

CASE.

By the ſtatute 25 Geo. III. cap. 51, it is enacted, that all penalties thereby inflicted of the amount of 50 l. ſhall be ſued for in the Courts at *Weſtminſter*; the ſtatute then provides "that it ſhall and may be lawful for any Juſtice reſiding near the place where the offence ſhall be committed, "to hear and determine any offence againſt this Act, which "ſubjects the offender to any pecuniary penalty not amounting to 50 l." and afterwards enacts that the Juſtice may mitigate the penalties. An action was brought to recover penalties under this ſtatute, ſome of 50 l. with other counts for penalties of 10 l. and verdict was given for the plaintiff on the 10 l. counts only. The queſtion now was, Whether the ſuperior Courts have any juriſdiction over the penalties *under* 50 l. or whether it be not ouſted by the clauſe above-recited.

LORD KENYON, C. J.—In general, the popular argument that a penalty ſhall not be incurred without the intervention of a Jury, and which preſſes on the minds of the Court, is urged on the part of the defendant: but in this caſe, the reverſe of that argument ought to prevail. For it is clear that the Legiſlature inſerted this clauſe for the benefit of the proſecuted; and they enacted that, when a party ſhould incur one of the ſmaller penalties of the act, he ſhould be ſued before a Magiſtrate, in order to prevent his being ſaddled with the unmerciful coſts of a mercileſs proſecutor. Therefore I think that we are acting up to the full intent of the Legiſlature, in ſaying that theſe penalties can only be recovered before a Magiſtrate. For though I agree that in general the juriſdiction of this Court is not to be ouſted but by expreſs words, and where no particular mode



is pointed out, by which a penalty is to be recovered, the proceeding muſt be by action in the ſuperior Courts, yet there is another maxim equally clear, *expreſſum facit ceſſare tacitum.* Now by the 59th ſection of this ſtatute, which is ſubſequent to that which directs that the 50l. penalties ſhall be ſued for and recovered in the ſuperior Courts, it is provided, that "it ſhall and may be lawful to and for any Juſtice of the Peace reſiding near the place, &c. to hear and determine any offence againſt this act, which ſubjects the offender to any pecuniary penalty, not amounting to 50l." And the words "ſhall and may" have been held in many caſes to be imperative. If this were not the true conſtruction of this clauſe, the 63d ſection, which enables the Magiſtrate to mitigate the penalties, might be rendered nugatory. Therefore I am of opinion that, according to the intention of the Legiſlature, and the fair conſtruction of this Act of Parliament, all the penalties inflicted by it, not amounting to 50l. can only be recovered before a Juſtice of the Peace.

ASHHURST, J.—Generally ſpeaking, this Court cannot be ouſted of its juriſdiction but by expreſs words, or by neceſſary implication, any more than an heir at law of his inheritance: the *neceſſary implication*, in both inſtances, is ingrafted on the general rule. Nothing can be clearer than the intention of the Legiſlature in this inſtance: the greater penalties muſt be ſued for in the ſuperior Courts, but the ſmaller offences may be enquired into by a Juſtice of the Peace. And there ſeems to be a good reaſon for the diſtinction; for the latter has the power to mitigate the penalties. And it would have been abſurd to have ſaid, that the Juſtices ſhould have a concurrent juriſdiction with this Court, and that they ſhould have the power of mitigating the penalties, and that we ſhould not; for if it were optional in the proſecutor to ſue where he pleaſed, he would of courſe inſtitute his ſuit before that juriſdiction, by whom the penalties could not be mitigated.

BULLER, J. and GROSE, J.—Of the ſame opinion.

Rule abſolute.

GLOVER

GLOVER, *v.* LANE, *Clerk.*

The plaintiff obtained a verdict at the laſt *Stafford* Aſſizes, for that he being ſeiſed of part of *Sutton Colfield* waſte, within the manor of *Perry Bar*, in his demeſne, as of fee, built and incloſed a houſe, and approved the ſame, into which the defendant of his own wrong broke and entered, &c.

The defendant had pleaded that he was Rector of the pariſh where that part of the common lay, in which he was ſeiſed in his demeſne as of freehold, and had common of paſture there, in the enjoyment of which he was prevented by the erection of this houſe.

It was now moved to arreſt the judgment, upon the ground that *none but the Lord of the Manor could approve.*

LORD KENYON, C. J.—It has been inſiſted, in ſupport of this motion, that the party approving muſt in ſtrictneſs appear to be the Lord of the Manor: but, if that were ſo, half of the waſtes in the kingdom could not have been approved. For many of the places that are called manors would not be found to be ſuch in point of law, if the matter were ſtrictly examined. To conſtitute a manor, it is neceſſary not only that there ſhould be two freeholders within the manor, but two freeholders *ho'ding of the manor, ſubject to eſcheats.* After this motion was made, I looked into the ſecond Inſtitute on this ſubject, where I found every paſſage ſupporting the approvement in this caſe. Lord Coke even doubted whether at common law the Lord could not approve; for which he cites, Tr. 6 Hen. III. And though in the ſtatutes of Merton and Weſtminſter 2, only the Lord is mentioned; yet, in thoſe days, there was a paucity of expreſſion in Acts of Parliament; and the *Lord of the Manor* is put as the *owner of the ſoil*, where they ſtand in the ſame predicament. And a contrary deciſion, in this caſe, would be ruinous indeed, and extremely prejudicial to the public. Therefore I am of opinion that there is no pretence to arreſt the judgment.

ASHHURST, J.—It would be a very narrow conſtruction on theſe Acts of Parliament to ſay that only the Lords of Manors can approve. We are to conſider the policy of thoſe ſtatutes; they were not made merely for the benefit of the Lord, but of the Public. If there be more than a ſufficiency of common, the Public ought not to be deprived of the advantages that may be made of the waſtes; for it was intended that they ſhould be benefited by the encreaſe of culture.



BULLER, J.—I have looked into the precedents, and they are as has been ſtated by the defendant's counſel: but that cannot decide this queſtion. For if in point of fact all thoſe precedents have been of caſes where the Lord of the Manor has approved, it does not follow from thence that none but the Lord of the Manor can approve. The only doubt (if there be any doubt at all) is whether thoſe ſtatutes extend to waſtes that are not waſtes of a Manor: but it is not neceſſary to decide that queſtion here; for the replication ſtates that this is a large waſte within a Manor. Now it appears from the caſes, that if the part be ſevered from the Manor, it does not prevent its being approved. "If the Lord grant over the waſte, the alienee may approve." This is the preſent caſe. It is not neceſſary to go farther for the determination of this queſtion; but if it were, I ſhould have no difficulty in ſaying that at Common Law the Lord might have approved as much in caſes of common by grant as of common appendant. Lord Coke indeed ſeems to have been of a different opinion: but I find no reaſon for that opinion. And if a Lord of a Manor, having 1000 acres, grant away a few of them to a freeholder, it is too much to ſay that he may not approve any part of the reſt. I ſhould require the moſt explicit authority before I could accede to ſo abſurd a propoſition.

GROSE, J.—declared himſelf of the ſame opinion.

Rule diſcharged.

DEWAR, v. SPAN.

On the ſale of a Weſt India eſtate, a bond was taken by the plaintiff's father for the purchaſe money, bearing the intereſt of the iſland, namely 6 *per cent.* which bond was afterwards cancelled, and another executed in England in lieu thereof, in which the ſame intereſt was reſerved. Upon an action of debt on this bond, Lord Kenyon non-ſuited the plaintiff on the ground of uſury.

It was now urged, to ſet aſide this non-ſuit, that by the ſtatute 14 Geo. III. cap. 79, "all ſecurities executed *here* of "or concerning any lands, &c. in the *Weſt Indies*, or *Ire-* "*land*, ſhall be valid, provided no greater intereſt than is "allowed in thoſe places, be ſecured." The firſt bond was therefore certainly legal, and the ſecond being given in conſequence of it, and it being part of the agreement at the time of the ſale of the eſtate that this purchaſe-money ſhould remain on bond, this is in the ſame ſituation.

LORD

LORD KENYON, C. J.---The queſtion is, Whether a bond given by one perſon to another, both reſident in this country, is valid, though it reſerve a greater intereſt than is allowed by the laws of this country. The ſtatute 14 Geo. III. cap. 79. (which, it has been argued, protects this Caſe) is an enabling act, extending to particular caſes therein mentioned, and does not reach any others. Now it enacts, that mortgages and other ſecurities reſpecting lands in Ireland and the Weſt Indies, reſerving intereſt allowed in thoſe countries, ſhall be valid, though executed in England: but it does not extend to *perſonal* contracts. And if the preſent attempt were to ſucceed, it would ſap the foundation of the ſtatutes of uſury.

The three other Judges concurring,

Rule diſcharged.

CASES in the COURT OF COMMON PLEAS, in Hilary Term, 30 GEO. III.

TOUCH, *on the Demiſe of* WARD, *v.* WILLINGALE.

This was a motion to ſet aſide a non-ſuit in the following Caſe; viz. The defendant rented certain premiſes from year to year, and had regular notice from the plaintiff to quit. But, not quitting purſuant to the notice, the plaintiff diſtrained for the rent due at the time the notice expired, and alſo for a quarter's rent which had afterwards become due for the time the defendant held over ſince the expiration of the notice. The plaintiff was non ſuited at the trial of the ejectment, on the ground that diſtraining for rent which accrued after the expiration of the notice to quit, was a waiver of the notice.

Now upon cauſe ſhewn, the Caſe of *Doe* v. *Batten* (Cowper, 243) where the acceptance of rent after the expiration of notice to quit, was held not to be a waiver of the notice but a queſtion for the Jury to find the intention of the parties upon, was inſiſted on as analogous to the preſent.

LORD LOUGHBOROUGH ---There could be no queſtion of intention left to the Jury, as the taking a diſtreſs was an act not to be qualified, and an expreſs confirmation of the tenancy.

GOULD,



GOULD, J.---In the mere acceptance of rent, the *quo animo* is to be left to the Jury, agreeable to Lord Mansfield's doctrine in the caſe in Cowper. But I agree with my Lord Chief Juſtice, that the diſtreſs was, in this caſe, an act not to be qualified, and amounted to a confirmation of the tenancy.

WILSON, J.---I am of the ſame opinion. In *Doe* v. *Batten*, there was a deſign to deceive the landlord; and a queſtion, I remember very well, was made, whether he ſhould be bound by the terms of the receipt in which the money was called *Rent* for that direct purpoſe; which was the ground of Lord Mansfield's ſaying, that the queſtion *quo animo* ſhould be left to the jury. The mere acceptance of money is equivocal; it may be in ſatisfaction for the treſpaſs, or it may be for rent: and in an action of treſpaſs for meſne profits, accord and ſatisfaction may be pleaded in bar if rent has been accepted. There would be no doubt but that the plaintiff would not have been precluded by taking a diſtreſs, if, inſtead of the year and a quarter, it had been only for rent due at Michaelmas, becauſe the ſtatute ſays, that a diſtreſs may be taken within ſix months after the determination of a leaſe, provided the intereſt of the landlord, and the poſſeſſion of the tenant continue: the law in this reſpect being altered ſince the time of Lord Coke, when the old notion prevailed, that a diſtreſs could not be taken, unleſs the ſame relation ſubſiſted between the parties.

Rule diſcharged.

PARSONS v. THOMPSON.

CASE.

The plaintiff was a maſter-joiner in one of the King's Dock-Yards; the defendant, having a view of ſucceeding him, entered into a written agreement to allow him, in caſe he ſhould procure himſelf to be ſuperannuated, and the defendant ſucceed to his appointment, his *extra-pay* from the yard-books, excluſive of the ſuperannuation-money paid by Government, during his life.

An action of aſſumpſit was brought for the *extra-pay*; and now upon ſhewing cauſe why the verdict ſhould be ſet aſide, and a non-ſuit entered,

LORD LOUGHBOROUGH delivered the judgment of the Court. On the trial of this cauſe two points were made, one, whether the agreement was legal, the other, what was *the meaning* of *extra* pay. The ſecond queſtion is imma-

terial, if the firſt be againſt the plaintiff. But it is to be obſerved, that if the conſtruction be as the plaintiff contends, that all which the defendant could receive as maſter-joiner would be 2s. 6d. a-day, the objection to the validity of the agreement is ſtill more apparent; becauſe it would have this effect, that no exertion of the defendant, for which *extra* pay would be due, would be beneficial to himſelf, which might produce public miſchief. But taking the agreement on this point in a reſtrictive ſenſe, that it means a certain ſtated and fixed allowance, beyond 2s. 6d. a-day, underſtanding it to be a defined known ſhare of perquiſites, we are all of opinion that it does not afford a juſt cauſe of action. Every action on promiſes muſt reſt on a fair and valuable conſideration, which it is for the plaintiff to make out. What is the conſideration ſtated here? That the plaintiff repreſented himſelf as unfit for future ſervice, and entitled to a penſion for the paſt. This he did at the requeſt of the defendant, on the promiſe from him of a certain allowance. Now the repreſentation was either true or falſe. If true, there was no ground for any bargain with the defendant: the plaintiff did nothing for the defendant; all he did was for his own eaſe and advantage. If falſe, the public is deceived, the penſion miſapplied, and the ſervice injured. It is not ſtated that the plaintiff procured the appointment for the defendant, (which would clearly have been brocage of office and bad), but that he made way for the appointment. But from thence no valuable conſideration can ariſe. Had the tranſaction paſſed with the knowledge of the Admiralty, judging of the caſe, and applying at their diſcretion the allowance they are bound to make, poſſibly it might have ſtood fair with the public: I ſay poſſibly only; to be ſure the ground of deceit on the public would be done away. But this caſe reſts on a private unauthenticated agreement between the officers themſelves, which cannot admit of any conſideration ſufficient to maintain an action. If it could be proved that it was to be meaſured by money ſo as to form a valuable conſideration, it muſt be in reſpect to the time when it was made, when the plaintiff was prevailed upon to retire in favour of the defendant. In this view it certainly would approach very near to brocage; it would differ very little in effect from ſelling the intereſt itſelf, though there would be a difference in the conduct of the party, who in the one caſe would be paſſive, in the other active. But his paſſive merit, if I may uſe the expreſſion, would not avail him, where his active exertion would be a demerit. The caſe cited from 1 *Vern.* 98, I think, may be ſupported.



ſupported. It was of the purchaſe of a commiſſion in the army, which the Duke of Ormond refuſed to ratify, on the ground, that the plaintiff had bought, without the other party having leave to ſell, who had not bought. I ſhould rather ſuſpect, from the uſual inaccuracy of the caſes in Vernon, that the plaintiff got the commiſſion by ſucceſſion, and ſet up this defence againſt the payment of the bond. There is ſomething very like it in the reaſoning of the Court, who held there was no relief againſt the bond. The queſtion of the conſideration did not occur to them; and they ſeem to have holden that where commiſſions were generally ſaleable, there was nothing unfair in ſuch a tranſaction. The next caſe in 2 *Vern.* 308, if true, is a deciſion undoubtedly contrary to what we now decide, and, I think, contrary to an evident principle of law. On the ſtate of the report, the bonds are directly and plainly given for brocage of an office of truſt and profit, which is not an object of ſale. I have therefore no difficulty to ſay that I hold that caſe to be extremely ill-determined, if the note of it be at all correct. The caſe of *Ive* v. *Aſh*, *Prec. Chanc.* 199. I think rightly determined; there was a purchaſe of a commiſſion allowed to be ſold; the commiſſion was given up, and the purchaſer wanted to get rid of the bargain, and be free from the agreement. He objected that a commiſſion in the marines could not be ſold; but it turned out, upon examination, that the ſale of ſuch commiſſions was permitted, not being looked upon as within the ſtatute. I therefore hold that caſe to be well adjudged: for the queſtion whether an office is ſaleable or not, is a matter of public regulation, and not a queſtion for a court. If by public regulation, right or wrong, certain offices are ſaleable, the Court cannot ſet aſide the tranſaction for their ſale; the Court is not to make the regulation. Whether by the general police of the country an individual office is ſaleable or not, is not a matter of law. But in the preſent caſe there is no ground to ſay, that the defendant's office was ſold under any regulation, or that the tranſaction between the parties was carried on under any authority, or with the conſent of their ſuperiors. This agreement, reſting on private contract and honour, may perhaps be fit to be executed by the parties, but can only be enforced by conſiderations which apply to their feelings, and is not the ſubject of an action. The law encourages no man to be unfaithful to his promiſe, but legal obligations are, from their nature, more circumſcribed than moral duties.

Judgment for the Defendant.

It may not be improper here to inſert the Judgment of this Court on a queſtion ſimilar to the above, delivered in Michaelmas Term, 27 Geo III. *in the Caſe of* GARFORTH *v.* FEARON, where the Plaintiff had procured the Defendant to be appointed to the office of *Cuſtomer of the Port of Carliſle*, and had taken from him a declaration that the office was held in truſt for the Plaintiff, and a promiſe to appoint ſuch deputy as he ſhould nominate, and alſo that the Plaintiff ſhould receive all the fees, profits, and ſalaries, to his own uſe. The queſtion before the Court was, Whether a non-ſuit ſhould be entered on an action for the fees and profits?

LORD LOUGHBOROUGH delivered the Judgment of the Court as follows:—On full conſideration of all the arguments uſed in this cauſe, I am of opinion that the tranſaction which is the foundation of the action is illegal, and the agreement void. This tranſaction concerns a public office, deemed by law to be a place of public truſt, prohibited to be ſold; and even the deputation of which, where ſuch deputation may be made, cannot be an object of ſale. The tranſaction is, that Fearon being appointed by the recommendation of Garforth, ſhall not interfere in the office, but ſhall appoint ſuch deputies as Garforth ſhall nominate, and pay to him the profits. The effect of this is, that to all profitable purpoſes, and as to all the exerciſe of the office except as to ſigning a receipt for the ſalary, Garforth is the real officer, but is not accountable for the due execution of it; he may enjoy it without being ſubject to the reſtraints impoſed by law on ſuch officers, for he does not appear as ſuch officer; he may vote at elections, he may exerciſe inconſiſtent trades, he may act as a magiſtrate in affairs concerning the revenue, he may ſit in parliament, and will be ſafe if he remains undiſcovered. If extortion be committed in the office by thoſe appointed, the profits of that extortion redound to him, but he eſcapes a proſecution; for not being the acting officer, he does not appear regiſtered upon the records of the Exchequer, and is not liable to the diſabilities impoſed by the ſtatute on officers guilty of extortion, who are incapacitated to hold any office relating to the revenue. Whether a truſt can be created in ſuch an office, is for the conſideration of the Court in which the ſuit was originally brought: the only queſtion in this Court is, Whether the agreement ſpringing out of ſuch a tranſaction can ſupport an action?

The written agreement of the 25th of February 1773, was for two purpoſes; one, to appoint ſuch deputies as the Plaintiff ſhould name; the other, to pay over to him all the profits



fits of the office. Though this Caſe has been argued very fully and very ingeniouſly by the Counſel on both ſides, I do not recollect any argument uſed in ſupport of the firſt promiſe, namely, to appoint, at the nomination of another, deputies, for whom the perſon appointing is in point of Law anſwerable, and whoſe places he is not allowed to ſell or bargain for. The argument and doctrine laid down in the Caſe of *Smith* v. *Colſhill* 2 *And.* 55. which is ſimilar to this, are, that if one part of the agreement were bad, no action could be maintained on any other part which might be good. But it is not neceſſary to reſt on this point, becauſe I am of opinion that the agreement is bad in both parts. If it be without any conſideration in a Court of Law, no action will lie upon it; it is but *nudum pactum*. What then is the conſideration upon which this agreement proceeds? It is that Fearon is appointed on the application of Garforth, in truſt for him; this is the conſideration. Now what is this but in plain terms this propoſition; *viz.* that the Public is abuſed, and the King deceived in the application? I ſhould therefore not find much difficulty to conclude, if there were nothing more in the Caſe, that the Common Law would not ſupport an *aſſumpſit* on ſuch an agreement.

But I think it is clearly void by poſitive law reſpecting this office. The appointment of any cuſtomer by any means contrary to the ſtatute 12 *Ric.* II. *cap.* 2. is a miſdemeanor. That ſtatute, though very ancient, is certainly not obſolete; it is the ſtatute under which they are ſworn in the Exchequer. It not only prohibits the appointment, but goes on to ſay that "none that purſueth by him or by others, privily or "openly to be in any manner of office ſhall be put in the "ſame office or in any other," and the 5 & 6 *Ed.* VI. *cap.* 16. makes void all promiſes, bonds, and aſſurances, as well on the part of the bargainor, as the bargainee. It is ſaid that this was no ſale of the office, that no money has paſſed on the part of Fearon to obtain it. But the ſtatute does not ſtop there. It is neither confined in its expreſſion nor its intent. In the caſe where a perſon obtaining an office gives money, the words of the act are extremely general, and according to their obvious conſtruction without any enlargement neceſſarily require that all bargains for money concerning thoſe offices which are mentioned in the ſtatute, are and ſhall be prohibited. Now is it not clear that the Plaintiff has bargained with the Defendant? would the Defendant have had the office without that bargain? The promiſe which is the ground of this action is, that the Plaintiff ſhall have

all the profits. By the words of the ſtatute any profit, however ſmall, would have affected the tranſaction; but here there is a bargain for the whole. Courts of Law have very properly conſidered this as a remedial ſtatute, and have conſtrued it liberally where the validity of ſuch a tranſaction has been brought before them.

The caſe of Sir Arthur Ingram has been cited, and there it is clear that the tranſaction was not immoral; it was no otherwiſe wrong than as it was prohibited by a poſitive ſtatute. It was a bargain between Sir Edward Vernon and Sir Arthur Ingram, for a ſurrender of the office of cofferer of the houſehold; on the ſurrender of Vernon, Ingram was appointed, and a bond given to account for the profits. This was holden to be within the ſtatute, becauſe he had charge of the king's money to pay the houſehold. In that caſe the king was not deceived, the tranſaction was public and notorious, and the crown was diſpoſed to have re appointed the officer with a *non obſtante*; but the queſtion being referred to the Chancellor and twelve Judges, whether the king could by a *non obſtante* give the right of receiving the appointment to Ingram, their opinion was, that the Caſe was within the ſtatute, and therefore that Ingram was diſabled from taking the office, and could not by a *non obſtante* be made capable of holding it. In the Caſe of *Godolphin* v. *Tudor*, 6 *Mod.* 234. which is alſo in 2 *Salk.* 251. which was mentioned in the argument, the tranſaction was between the principal and the deputy; and the agreement was, that the deputy executing the office ſhould pay to the principal, out of the profits, a certain ſum. The Court there held, that where the agreement was to pay out of the profits a certain proportion of the profits, it was not within the ſtatute; and the reaſon given is very plain, and carries its own authority with it, namely, that the principal is entitled to all the perquiſites and fees of the office, and the deputy to recompence, as it were, on a *quantum meruit* for the labour he has in the execution of it. All the effect therefore of ſuch an agreement is, to aſcertain the ſhare which the deputy ſhould have for the execution of the office. But it is remarkable with what ſtrictneſs the Courts have holden that propoſition, and how careful they have been to guard againſt any tranſaction that might give any colour to the principal's receiving a groſs ſum out of the profits of an office executed by a deputy. For in this caſe, as it is reported in 6 *Mod.* the agreement was that Tudor ſhould pay Godolphin 200l. a-year, and it appeared upon record that the profits of the office amounted to 329l. 10s. every year in which it had been executed by Tudor;

but



but as the ſtipulation was to pay 200l. a-year abſolutely without any reference to the profits of the office, the Court thought themſelves bound to give judgment for the Defendant. Now that was a tranſaction perfectly fair, the miſtake in ſtating the manner of the agreement was an innocent one; but the Court wou'd not permit the Plaintiff to recover on an agreement, where it was not ſtated on the agreement itſelf, that the payment ſhould be only of a portion of the profits, and not an abſolute one of the whole.

Courts of Equity, in ſetting aſide ſecurities ſuppoſed to be valid at law, have gone by the ſame rule, and have been juſt as careful not to permit by any conſtruction any breaches to be made in the proviſions of the ſtatute. The Caſe of *Lockner* v. *Strode*, 2 *Chan Caſ* 48. was quoted as a determination, where the Court of Chancery held a looſer rule with reſpect to giving a bond for the payment of a certain ſum to the principal appointing a deputy. But that caſe is, as moſt of the others are in the ſame Book, groſsly miſreported: no ſuch determination was made, and both the ſtate of the Caſe and the deciſion are perfectly miſtaken. I have a copy of it from Lord Nottingham's notes, from which it appears, that the Defendant, being ſheriff, made John Lockner his under-ſheriff; and the Plaintiff, who was the brother of John Lockner, gave a bond as a temporary ſecurity till the common ſecurity was given. John gave a bond in the uſual form from an under-ſheriff to his principal, for performance of the covenants in the indenture; but the firſt bond was not given up. Strode, after he was out of office, arreſted the Plaintiff on it, who was obliged to give bail to Sir Francis Rolle, the ſucceeding ſheriff in 600l.; and to be relieved was the object of the bill. The Defendant pleaded a ſpecial agreement, that the bond was to ſecure him 400l. by quarterly payments for the under-ſheriff's place. This the Plaintiff denied, and alſo inſiſted that ſuch an agreement was illegal, and contrary to the ſtatute 23 *Hen.* VI. *cap.* 9. The Chancellor being under doubts, a trial was directed, and the point reſerved. So that no opinion was given by him on the validity of the tranſaction. The date of that Caſe is alſo miſtaken; it is ſtated in the report to have been Feb. 9, 1680, but it was in fact in Hilary Term, 21 *Car.* II. But in a ſubſequent Caſe, Lord Nottingham very plainly intimated what would have been his opinion, if the agreement had been found good in law. That was the Caſe of *Juxton* v. *Morris*, which is in the ſame book and alſo miſreported. By Lord Nottingham's notes it appears that a biſhop's Regiſtrar made a deputation of his office, rendering thereout 90l.

per annum; the Plaintiff exhibited a bill for an account, and the Defendant pleaded that it was within the ſtatute of 5 & 6 *Ed.* VI. and that there ought to be no account. It was anſwered, that this was only a reſervation of part of the profits, and the principal being intitled to the whole, it was not illegal; which (ſays Lord Nottingham) "ſeemed ſpecious." But, upon looking into the bill, it charged an expreſs covenant to pay 90 l. a-year, without reference to the profits of the office. The plea was therefore allowed, and the bill diſmiſſed. Theſe caſes connected, ſhew that the opinion of the Court of Chancery at that time, in conſidering how far theſe ſecurities were liable to be avoided as contrary to the proviſions of the ſtatute, was, that between principal and deputy there might be a reſervation out of the profits (though Lord Nottingham did not expreſsly ſo determine); but if otherwiſe, the ſecurity was clearly bad. In the caſe of *Law* v. *Law*, Lord Talbot ſet aſide a bond, ſuppoſing it to be good in a Court of Law, the conſideration of which differed very little from the preſent. On the part of the Plaintiff, the caſe of *Bellamy* v. *Burrow* was relied on, as an authority to ſhew that a Court of Equity will permit a truſt to be created of an office, clearly within the ſtatute of *Ed.* VI. and on reading that caſe with attention, I admit it is a determination full to the point for which my brother Adair cited it; and undoubtedly as ſuch a determination it is of very conſiderable authority, both in reſpect to the learning and the known integrity of Lord Talbot. But it is fit to be obſerved, that in the ſame caſe there ſtands very fully delivered the opinion of Sir Joſeph Jekyll to the contrary; and it reſts upon an oppoſition between two very learned and upright men. Either opinion is probable, when there is ſuch authority for its ſupport. I will not enter into the conſideration of that caſe; nor is it neceſſary to give an opinion here, whether a truſt can in any inſtance be created in ſuch on office. I do not take upon myſelf to ſay, without other conſideration than the preſent circumſtances can afford, that there is no poſſible caſe in which a truſt fit to be executed may not be created in offices within the ſtatute of *Ed* VI. This is not a caſe of the execution of a truſt, the cognizance of which is peculiar to a Court of Equity. Perhaps, if the Maſter of the Rolls had fixed on Fearon the character of a truſtee, a Court of Law might not think itſelf at liberty to queſtion the authority of the determination. But the whole queſtion for a Court of Law to determine is ſimply, whether there appears a good conſideration on which an *aſſumpſit* can be ſupported? And I am of opinion, for the reaſons I have

ſtated,



ſtated, both on the principles of the common law, and becauſe the tranſaction is in defiance of the ſtatutes which have been made to guard againſt evils of the ſame nature, that the conſideration of the promiſe in this caſe is bad, that conſequently it will not ſupport an *aſſumpſit*, and therefore that a verdict muſt be entered

For the defendant.

CASES in the KING'S BENCH, in HILARY TERM, 30 GEO. III.

REX, *v. Guardians of the Poor of the Hundreds of* TUNSTEAD *and* HAPPING, *in Norfolk.*

By the 25th Geo. III. cap. 27. any *occupier* of lands or tenements, within the hundreds above-mentioned, are *compellable* to take apprentices at the requiſition of the Guardians of the Poor. A poor child was ſo bound to J. Reynolds, who appealed to the ſeſſions; and the ſeſſions determined, ſubject to the opinion of this Court, that Reynolds, not being an *inhabitant* of the diſtrict, but an occupier of lands only, was not bound to receive the apprentice.

It was now argued that the ſtatute 20 Geo. III. cap. 36, (which ſays no perſon ſhall be compelled to take an apprentice unleſs he ſhall be an inhabitant *and* occupier of the pariſh) muſt be taken *in pari materia* with this of the 25th of Geo. III. And that the Caſe of the *King* v. *Clapp*, being determined on the 43d of Eliz. cap. 2. does not affect this Caſe.

LORD KENYON, C. J.—This Caſe is not to be diſtinguiſhed on principle from that of *R.* v. *Clapp*; and we ſee no reaſon to depart from the opinion which we gave in that Caſe. It would require very ſtrong words to convince me, that this particular diſtrict ſhould be governed by a different law from the generality of pariſhes throughout the kingdom: if indeed the Legiſlature had uſed imperative words, we muſt have been bound by them; but there are none ſuch in this ſtatute. Here great ſtreſs has been laid on the proviſo in 20 Geo. III. which has the words "inhabitants *and* occupiers." Now the ſtatute 43d Eliz. uſes the word "inhabitants," which has been held not to be confined to *reſiants*; and Lord Coke, in his reading on the 22d Hen. VIII. cap. 5. relative

relative to the repairing of bridges by the *inhabitants* of counties, ſays, that the word "*inhabitants*" includes thoſe who occupy lands in the county, though they do not reſide there. For ſome purpoſes "*inhabitants*" and "occupiers" are ſynonymous terms. Where a perſon derives a benefit from property which he occupies in a pariſh, he is liable to contribute to the eaſe of it; and in *Rex* v. *Clapp*, we obſerved that this was one of the modes by which he was to contribute to the eaſe of his pariſh. If indeed the Legiſlature had added the word "reſiants" to "inhabitants" in this Act of Parliament, that would have confined this burden to perſons actually reſiding within the pariſh.

The three other Judges concurring,

Order of ſeſſions quaſhed.

REX, *v. Inhabitants of* BRIDGEWATER.

Thomas Baſtard's children were removed, by order of two Juſtices, from *Cardiff* to *Bridgewater*.

The ſeſſions confirmed the order.

CASE.

T. Baſtard was rated at Cardiff, as tenant in the land-tax-book (in which book the landlord alſo was named) but before any tax had been paid, he abſconded. At the requeſt of the landlord, and to ſave him from the payments, the Collector went to diſtrain Baſtard's goods. A child of Baſtard's, about thirteen years old, who was in the houſe, begged them not to diſtrain; but went with them to a neighbour, who paid the Collector the money, and took the change and a receipt. The landlord was preſent at the whole tranſaction.

The COURT ſaid, the money was raiſed for Baſtard's uſe, and an action would lie againſt him for it. If this friend had not interfered, Baſtard's goods would have been taken.

Both orders quaſhed.

REX,



REX, *v. Inhabitants of* WALTON *in the* DALE.

R. Cunliffe was removed by order of two Juſtices from Walton to Kirkham. The ſeſſions, upon appeal, quaſhed the order.

CASE.

The pauper had an original ſettlement in *Kirkham*; but afterwards bound himſelf apprentice by indenture, under which he ſerved two years in *Walton*. By the indenture, the pauper covenanted to provide himſelf in proviſion, lodging, apparel, and phyſic, during the term; and the maſter was to pay him five ſhillings a week for the firſt three years; ſix ſhillings a week for the two next years; and ſeven ſhillings a week for the remaining time. The indenture was written on a proper ſtamp, but no additional duty was paid, according to the ſtatute 8 Anne, cap. 9. (which voids any indenture where a duty *ad valorem*, on the apprentice-fee or any *thing* in lieu thereof, has not been paid.) The appellants produced this indenture in proof of the ſettlement in *Walton*, which, the reſpondents contended, was inadmiſſible evidence, and in itſelf void; but the ſeſſions, upon the appeal, admitted it in evidence, and quaſhed the order of two Juſtices.

LORD KENYON, C. J.—The principal queſtion, relative to the additional ſtamp-duty, cannot be decided on this caſe, as it is now ſtated. I believe it is the practice at the ſtamp-office to ſet a value on theſe ſorts of benefits, as a matter of courſe, when the indentures are carried to them. Now here the apprentice ſtipulated to provide himſelf with certain things, which, it is ſaid, the maſter is bound by law to provide for him, and for which it is contended an additional ſtamp duty ought to have been paid, becauſe it is a benefit to the maſter: but, on the other hand, the maſter was to make certain weekly payments to the apprentice. Then how can we ſay that theſe payments were not an equivalent for the maintenance, &c.? I believe they are much more But, before we can decide the material queſtion, the Juſtices muſt find the fact, whether theſe payments were, or were not, an equivalent. I therefore ſtudiouſly avoid giving any opinion on the general queſtion: and it is enough for me to ſay at preſent, that it does not appear but that the maſter gave an equivalent for the benefit which he received.

BULL.

BULLER, J.—I do not ſee any thing like a benefit to the maſter, for which an additional duty ought to have been paid. The maſter covenanted to pay the apprentice ſo much *per* week; that clearly is not within the ſtatute. Then it was provided that, in caſe the apprentice ſhould be ill, and unable to perform his buſineſs, or neglect to do it, he ſhould not receive any wages: but this was no benefit to the maſter; it was only an agreement that he *ſhould not pay*, but not *that he ſhould receive any thing*.

Order of ſeſſions confirmed.

REX, *v.* COOK.

The defendant, who is poſt-maſter at Kingſton-upon-Thames, was convicted before a Juſtice, under the 26th of Geo. III. cap. 51, for letting a horſe to travel poſt, without a ſtamp-ticket; and alſo for not inſerting an account of the ſame in his weekly account. He appealed to the ſeſſions, who affirmed the conviction, ſubject to the opinion of the Court. The chief circumſtances of the caſe were as follows: a letter was forwarded to the poſt-houſe at Kingſton, with the following way-bill, ſigned by the Poſt-Maſter-General: "*For his Majeſty's ſpecial ſervice, to the ſeveral "deputy-poſt-maſters, between Portſmouth and London, with "the utmoſt expedition.*" The defendant immediately diſpatched it, by a man and horſe, to the poſt-houſe in London. The letter was from the Governor of Portſmouth to the Secretary of State, and wholly related to the public concerns of the kingdom, and to no private matter whatever. The defendant was allowed three-pence a mile for this conveyance, in his account with the Poſt-office. No ſtamp-ticket was delivered to the poſt-boy with the horſe, at the time he went, and no account of the letting ſuch horſe was inſerted in the weekly account, which, under his licence to let poſt-horſes, the defendant is required, by the ſtatute, to keep. The caſe alſo ſtated, that the King's Meſſengers, going on the public ſervice, always pay the poſt-duty for horſes hired; and that letters to the public offices, though on government-ſervice, are always paid for at the Poſt-office.

LORD KENYON, C. J.—Generally ſpeaking, in the conſtruction of acts of Parliament, the king, in his royal character, is not included, unleſs there be words to that effect. This has been likened to ſeveral caſes to which I cannot, by any means, aſſimilate it: it has been ſaid, that if the duty be not paid for ſuch an expreſs as the preſent, becauſe it re-



lated to public buſineſs, the exciſe-duties will not be paid at the public offices; but exciſeable commodities are things *promiſcui uſus*, on which the duty is payable before it is known by whom they are to be conſumed. It was very properly decided in *Rex* v. *Webber*, that a conveyance by expreſs is not exempt from the payment of the duties impoſed by this act of parliament, if there be an immediate ſubject on whom the tax will fall. But this is the caſe of a public expreſs, on the ſervice of Government. The ſtat. 25 Geo. III. cap. 51. §. 4. enacts "that for and in reſpect of every horſe hired by the mile or ſtage, to be uſed in travelling poſt, there ſhall be charged a duty of 1½d. for every mile ſuch horſe ſhall be hired to travel poſt;" and the 15th ſection enacts, "that the poſt-maſter ſhall aſk, demand, and receive of and from the *perſon, or perſons, hiring the ſame* the ſum of 1½d. *per* mile, &c. Now in this caſe, who can be ſaid to be the perſon hiring the horſe? The packet was ſent for the uſe of Government; and it paſſed through the hands of the different poſt-maſters, who forwarded the expreſs in conſequence of an official duty incumbent on them. But they cannot be ſaid to be the perſons hiring the horſes within the meaning of the act. My opinion proceeds on the ground that this was on the ſervice of Government; and the caſe ſtates, in expreſs terms, that the packet contained a letter directed to one of the principal ſecretaries of ſtate, *and that it was not on any private buſineſs whatever, but wholly related to the public concerns of this kingdom.* Now although there is no ſpecial exemption of the king in this act of parliament, yet, I am of opinion, that he is exempted by virtue of his prerogative, in the ſame manner as he is virtually exempted from the 43 Eliz. and every other act impoſing a duty or tax on the ſubjects. And I underſtand that the horſes, carrying the mail, were never deemed liable to the poſt-horſe duty.

The three other Judges concurring,

Order of ſeſſions quaſhed.

REX *v.* JOTHAM.

The truſtees of a diſſenting meeting at Bradford invited John Lloyd to become their miniſter, which he accepted, and officiated as ſuch for two years, when he received a diſmiſſal, ſigned by part of the congregation; and the doors have ſince been ſhut againſt him. There is an endowment for

for the miniſter of this meeting; and Lloyd conceived himſelf appointed for life, unleſs he ſhould miſbehave.

On ſhewing cauſe why a *mandamus* ſhould not go to reſtore him, it was ſtated that he had behaved improperly in many inſtances; had ſlandered his congregation from the pulpit; that he had not obtained a licence as by law required; nor complied with the regulations of the Toleration-Act.

It was argued *contrà*, that theſe forms need not be ſtated to obtain a *mandamus*; and that in the caſe *Rex* v. *Barker*, (3 Bur. 1265) the *mandamus* was granted upon ſhewing the endowment; the election; and the removal.

LORD KENYON, C. J.—There is no doubt but that a *mandamus* lies in theſe caſes, where there is an endowment, if a proper caſe be made out. But it is neceſſary for a party applying for a *mandamus* to be reſtored to any office to make out a *primâ facie* title to ſuch office, and ſhew at leaſt that he has complied with all the forms neceſſary to conſtitute his right. Here it does not appear that the party applying has gone through all thoſe ceremonies which the particular ſect of which he is a member has made neceſſary. I am inclined alſo to think that the party applying ſhould have ſhewn his compliance with the requiſites of the Toleration-Act.

ASHHURST, J.—I think this application not ſufficiently founded; it is not enough for the complainant to ſtate his *ſuppoſition* that he was elected for life; he ought to have ſhewn the grounds of it. And in oppoſition to this, the other party has ſhewn an inſtance in which the congregation exerciſed the right of removing the miniſter.

BULLER, J.—The *King* v. *Barker*, was the caſe of a *mandamus to admit:* and there is a great deal of difference between that and a *mandamus to reſtore.* The former is granted merely to enable the party to try his right, without which he would be left without any legal remedy. But the Court have always looked much more ſtrictly to the right of the party applying for a *mandamus* to be reſtored. In theſe caſes he muſt ſhew a *primâ facie* title; for if he had been before regularly admitted, he may try his right by bringing an action for money had and received for the profits. Therefore, in order to entitle himſelf to this extraordinary remedy, he muſt lay ſuch facts before the Court as will warrant them in preſuming that the right is in him; whereas here no facts have been ſtated to ſhew the ground of his title. Therefore I am clearly of opinion, that this *mandamus* ought not to be granted.

GROSE, J. of the ſame opinion.

Rule diſcharged.



CURRY *v.* EDENSOR.

The defendant purchaſed cotton for the plaintiff, as his broker, and engaged for half per cent. to guarantee him againſt loſs on the re-ſale; ſome time after, the cotton was re-ſold at a great loſs, but, for ſeveral days after the goods were bought and guaranteed as above, the market-price was conſiderably higher than at the time of the firſt purchaſe.

Upon an action to recover the loſs ſuſtained by the re-ſale, a verdict was given to the plaintiff for the amount. Two queſtions aroſe on the trial, 1ſt, Whether a written minute of the firſt purchaſe, which proved the guarantee, ought to be admitted in evidence, the ſame not being ſtamped, as required by ſtat. 23 Geo. III. cap 58. 2dly, Whether the ſubſequent riſe of price did not exonerate the defendant's guarantee. Theſe queſtions now came for the conſideration of the Court upon a motion for a new trial.

LORD KENYON, C. J.---When the firſt objection was made at the trial, I thought that it was not taken without ſome ground; but, on looking into the Act of Parliament, I am of opinion that this is not ſuch an agreement as is required to be ſtamped. For it was made at the time of the original contract of ſale of theſe goods, and *related to the ſale of them*. But the ground, on which I proceed, is on the merits of the cauſe. I do not impute to the plaintiff any miſconduct, but that, being a ſpeculator in cotton, he was not ſatisfied with the moderate profits which he might have gained, but waited for a ſtill higher riſe in the market; and, having waited too long, he now wiſhes to be indemnified at the expence of the defendant. But I think, on the fair conſtruction of the contract of indemnity, that the defendant is diſcharged under the circumſtances which have happened; for the fair import of the contract is, that the defendant ſhould guaranty to the plaintiff that he ſhould be enabled to make a profit of the cotton; and there was evidence to ſhew that there had been a gradual riſe in the market for three weeks afterwards, during which time the plaintiff might have made conſiderable profits if he had choſen to avail himſelf of the opportunity. And having loſt that opportunity, I think he cannot now have recourſe to the defendant. If the agreement had been that the defendant was bound to give the plaintiff information reſpecting the time when theſe goods could be re-ſold to the greateſt *advantage*, there would have been ſome ground for the plain-



plaintiff's argument: but that was not neceſſary; and indeed it appears that the plaintiff muſt have been fully appriſed of the gradual riſe of the market, as he was in the habit of attending it. If this were not ſufficient to ſatisfy the contract of indemnity, no other line could be drawn. Therefore I am of opinion that there ſhould be a new trial.

ASHHURST, J.—I agree with my Lord on both points. As to the firſt: this is within the exception in the 23 Geo. III. cap. 58. This was not indeed a contract for the ſale of goods, but ariſing out of a contract for the ſale of them; therefore it is *relating to the ſale* of them. But, on the other ground I am of opinion that a new trial ſhould be granted; for it does not follow that, provided the plaintiff acted *bonâ fide*, he was at liberty to keep the goods as long as he pleaſed; he ought to have taken advantage of the riſe of the market, and could not indulge himſelf in any further ſpeculation at the expence of the defendant. It would be unjuſt to put ſuch a conſtruction on the contract; for then there would be no limits to the defendant's riſk, and the advantage would be all on the ſide of the plaintiff.

BULLER, J.—In anſwering the firſt objection, the counſel for the plaintiff have taken two different grounds; 1ſt, contending that this was a mere parol agreement only, and was not affected by the written evidence; and, 2dly, that if this written entry muſt be taken as evidence of the contract, it need not be ſtamped. As to the firſt, I am clearly of opinion that it muſt be conſidered as a contract in writing, and that there exiſted but one contract in writing between theſe two parties. If the plaintiff had relied on the parol evidence only, the witneſs, who was called to prove it, would have been aſked, on his croſs-examination, whether or not it was reduced to writing; and if he had anſwered in the affirmative, no parol evidence could have been given of it. This was all one entire contract, the foundation of which was the defendant's agreement to indemnify the plaintiff againſt any loſs which might ariſe on the re-ſale of theſe goods. But, notwithſtanding this, I think that this entry need not be ſtamped: and this appears from the manner in which I have already conſidered the contract. For this was a contract directly for the ſale of goods, or at leaſt it was a contract *relating to the ſale of them*. If the contract of indemnity had not exiſted, there would have been no contract whatever between the plaintiff and the original vendors of the cotton.

But, on the merits, the defendant is entitled to a new trial. The *meaning of the* guarantee ſeems to me to be "*I will engage* (ſaid the defendant) that you may ſell the



the cottons for as much as you gave for them." That is the full extent of the contract: if ſo, it remains to be enquired whether the plaintiff could have ſold the goods at an advanced price, and whether or not he has been guilty of negligence in not having ſo done. There is no doubt upon the evidence, but that he might have re-ſold them at a conſiderable advance. But it is objected that it does not appear that the plaintiff knew of the riſe of the market, and that the defendant was bound to give him notice of it. To this it may be anſwered, that the plaintiff, having engaged in a mercantile tranſaction, and having ſpeculated on the riſe and fall of the market, was bound to take notice of the true ſtate of it. In ſuch a caſe as this, where there was a continued advance in the price for three weeks, it was not neceſſary for the defendant to call on the plaintiff to re-ſell the goods. If indeed there had been a ſudden riſe in the market for a few hours, or for one morning, and that was known to the defendant and not to the plaintiff, the former would not have been diſcharged, unleſs he had informed the latter, who then neglected to take advantage of it. But here it is clear, upon the evidence, that the plaintiff might have made ſome gains, if he had choſen to avail himſelf of the opportunity. He neglected, however, to take that opportunity, and choſe to ſpeculate ſtill further, but that he could not do at the defendant's riſk; for if he *might* have profited by a re-ſale of his goods, and did not, that is ſufficient to diſcharge the defendant.

GROSE, J.—It does not ſeem neceſſary to determine whether or not this contract was in writing; if it were, I ſhould be inclined to differ from my brother *Buller*. I rather think it was a contract *by parol*, founded indeed on a contract in writing. The agreement, on which this action is brought, was a contract of indemnity; of which the written contract between the original parties formed no part. However, I am clearly of opinion that, whether this was ſo or not, this writing was admiſſible in evidence, though not ſtamped, as it *related to the ſale of goods*. On the other ground, I think that the contract of indemnity cannot be conſtrued to continue in force *at all events*, till the goods ſhould be ſold, be that time when it might. But the conſtruction put upon it by my brother *Buller*, is the true one, that the defendant engaged that the plaintiff *might* re-ſell the goods to advantage: and as there is no doubt on the evidence, but that that might have been done, I think the defendant is diſcharged, and that there ought to be a new trial.

Rule abſolute for a new trial.

MANN

MASON v. LICKBARROW, In the Exchequer-Chamber, In Error.

Judgment of the Court of Error in this Cauſe, was delivered in the Exchequer-Chamber, Feb. 11, 1790, by the Lord Chief Juſtice of the Court of Common Pleas, as follows:

LORD LOUGHBOROUGH.—This Caſe comes before the Court, on a demurrer to the evidence; the general queſtion therefore is, Whether the facts offered in evidence by the Plaintiffs in the action are ſufficient to warrant a verdict in their favour?

The facts are ſhortly theſe. On the 22d of July 1786, Meſſrs. Turings ſhipped on board the ſhip Endeavour, of which Holmes was maſter, at Middleburgh to be carried to Liverpool, a cargo of goods by the order and directions, and on the account of Freeman of Rotterdam, for which, of the ſame date, bills of lading were ſigned on behalf of the maſter, to deliver the goods at Liverpool, ſpecified to be ſhipped by Turings, to order or to aſſigns. On theſame 22d of July, two of the bills of lading were indorſed in blank by Turings, were tranſmitted by them, together with an invoice of the goods to Freeman at Rotterdam, and were duly received by him, that is, in the courſe of the poſt, one of the bills being retained by Turings. I take no notice of there being four bills of lading, becauſe on that circumſtance I lay no ſtreſs. On the 25th of July, bills of exchange for a ſum of 477 l.; being the price of the goods, were drawn by Turings, and accepted by Freeman, at Rotterdam, and Freeman on the ſame day tranſmitted to the Plaintiffs in the action, merchants at Liverpool, the bills of lading and invoice, which he had received from Turings, in order that the goods might be ſold by them on his account; and of the ſame date drew upon them bills to the amount of 520 l. which were duly accepted, and have ſince been paid by them; and for which they have never been reimburſed by Freeman, who became a bankrupt on the 15th of Auguſt following. The bills accepted by Freeman for the price of the goods ſhipped by Turings, had not become due on the 15th of Auguſt, but on notice of his bankruptcy, they ſent the bill of lading, which remained in their cuſtody, to the Defendants at Liverpool, with a ſpecial indorſement, to deliver to them and no other; which the Defendants received on the 28th of Auguſt 1786, together with the invoice of the goods,

and



and a power of attorney. The ſhip arrived at Liverpool on the 28th of Auguſt, and the goods were delivered by the maſter, on account of Turings to the Defendants, who on demand and tender of freight, refuſed to deliver the ſame to the Plaintiffs.

The Defendants in this Caſe are not ſtake holders, but they are in effect the ſame as Turings, and the poſſeſſion they have got is the poſſeſſion of Turings. The Plaintiffs claim under Freeman, but though they derive a title under him, they do not repreſent him, ſo as to be anſwerable for his engagements, nor are they affected by any notice of thoſe circumſtances, which would bar the claim of him or of his aſſignees. If they have acquired a legal right, they have acquired it honeſtly, and if they have truſted to a bad title, they are innocent ſufferers. The queſtion then is, Whether the Plaintiffs have a ſuperior legal title to that right which on principles of natural juſtice, the original holder of goods not paid for, has to maintain that poſſeſſion of them, which he actually holds at the time of the demand?

The argument on the part of the Plaintiffs aſſerts that the indorſement of the bill of lading by the Turings, is an aſſignment of the property in the goods to Freeman, in the ſame manner as the indorſement of a bill of exchange is an aſſignment of the debt. That Freeman could aſſign over that property, and that by delivery of the bill of lading to the Plaintiffs for a valuable conſideration, they have a juſt right to the property conveyed by it, not affected by any claim of the Turings, of which they had no notice. On the part of the Defendants it is argued, that the bill of lading is not in its nature a negotiable inſtrument; that it more reſembles a *choſe in action*, that the indorſement of it is not an aſſignment that conveys any intereſt, but a mere authority to the conſignee to receive the goods mentioned in the bill; and therefore it cannot be made a ſecurity by the conſignee, for money advanced to him; but the perſon who accepted it muſt ſtand in the place of the conſignee, and cannot gain a better title than he had to give. As theſe propoſitions on either ſide ſeem to be ſtated too looſely, and as it is of great importance that the nature of an inſtrument ſo frequent in commerce as a bill of lading, ſhould be clearly defined; I think it neceſſary to ſtate my ideas of its nature and effect.

A bill of lading is the written evidence of a contract, for the carriage and delivery of goods ſent by ſea, for a certain freight. The contract, in legal language, is a contract of *bailment*, 2 Lord *Raym.* 912. In the uſual form of the con-

tract,



tract, the undertaking is to deliver to the order or aſſigns of the ſhipper. By the delivery on board, the ſhip-maſter acquires a ſpecial property to ſupport that poſſeſſion which he holds in the right of another, and to enable him to perform his undertaking. The general property remains with the ſhipper of the goods, until he has diſpoſed of it by ſome act ſufficient in law to transfer property. The indorſement of the bill of lading is ſimply a direction of the delivery of the goods. When this indorſement is in blank, the holder of the bill of lading may receive the goods, and his receipt will diſcharge the ſhip-maſter; but the holder of the bill, if it came into his hands caſually, without any juſt title, can acquire no property in the goods. A ſpecial indorſement defines the perſon appointed to receive the goods; his receipt or order would, I conceive, be a ſufficient diſcharge to the ſhip-maſter; and in this reſpect I hold the bill of lading to be aſſignable. But what is it that the indorſement of the bill of lading aſſigns to the holder or the indorſee? A right to receive the goods, and to diſcharge the ſhip-maſter, as having performed his undertaking. If any farther effect be allowed to it, the poſſeſſion of a bill of lading would have greater force than the actual poſſeſſion of the goods. Poſſeſſion of goods is *primâ facie* evidence of title; but that poſſeſſion may be precarious, as of a depoſit; it may be criminal, as of a thing ſtolen; it may be qualified, as of things in the cuſtody of a ſervant, carrier, or factor. Mere poſſeſſion without a juſt title gives no property; and the perſon to whom ſuch poſſeſſion is transferred by delivery, muſt take his hazard of the title of his author. The indorſement of a bill of lading differs from the aſſignment of a *choſe in action*, that is to ſay, of an obligation, as much as debts differ from effects. Goods in pawn, goods bought before delivery, goods in a warehouſe, or on ſhip-board, may all be aſſigned. The order to deliver is an aſſignment of the thing itſelf, which ought to be delivered on demand; and the right to ſue, if the demand is refuſed, is attached to the thing. The caſe in 1 Lord *Raym.* 271. was well determined on the principal point, that the conſignee might maintain an action for the goods, becauſe he had either a ſpecial property in them, or a right of action on the contract: and I aſſent to the dictum, that he might aſſign over his right. But the queſtion remains, what right paſſes by the firſt indorſement, or by the aſſignment of it? An aſſignment of goods in pawn, or of goods bought but not delivered, cannot tranſmit a right to take the one without redemption, and the other without the payment of the price. As the indorſement of a bill of lading is an

aſſignment



aſſignment of the goods themſelves, 1. differs eſſentially from the indorſement of a bill of exchange: which is the aſſignment of a debt due to the payee, and which, by the cuſtom of trade, paſſes the whole intereſt in the debt ſo completely, that the holder of the bill for a valuable conſideration without notice, is not affected even by the crime of the perſon from whom he received the bill.

Bills of lading differ eſſentially from bills of exchange in another reſpect.

Bills of exchange can only be uſed for one given purpoſe, namely, to extend credit by a ſpeedy transfer of the debt, which one perſon owes to another, to a third perſon. Bills of lading may be aſſigned for as many different purpoſes as goods may be delivered. They may be indorſed to the true owner of the goods by the freighter, who acts merely as his ſervant. They may be indorſed to a factor, to ſell for the owner. They may be indorſed by the ſeller of the goods to the buyer. They are not drawn in any certain form. They ſometimes do, and ſometimes do not, expreſs on whoſe account and riſk the goods are ſhipped. They often, eſpecially in time of war, expreſs a falſe account and riſk. They ſeldom, if ever, bear upon the face of them any indication of the purpoſe of the indorſement. To ſuch an inſtrument, ſo various in its uſe, it ſeems impoſſible to apply the ſame rules as govern the indorſement of bills of exchange. The ſilence of all authors treating of commercial law is a ſtrong argument that no general uſage has made them negotiable as bills. Some evidence appears to have been given in other caſes, that the received opinion of merchants was againſt their being ſo negotiable. And, unleſs there was a clear, eſtabliſhed general uſage, to place the aſſignment of a bill of lading upon the ſame footing as the indorſement of a bill of exchange, that country which ſhould firſt adopt ſuch a law, would loſe its credit with the reſt of the commercial world. For the immediate conſequence would be, to prefer the intereſt of the reſident factors and their creditors to the fair claim of the foreign conſignor. It would not be much leſs pernicious to its internal commerce; for every caſe of this nature is founded in a breach of confidence, always attended with a ſuſpicion of colluſion, and leads to a dangerous and falſe credit, at the hazard and expence of the fair trader. If bills of lading are not negotiable as bills of exchange, and yet are aſſignable, what is the conſequence? That the aſſignee by indorſement muſt inquire under what title the bills have come to the hands of the *perſon* from whom he takes them. Is this more difficult

than



than to enquire into the title by which goods are ſold or aſſigned? In the caſe of *Hartop* v. *Hoare*, jewels depoſited with a goldſmith were pawned by him at a banker's. Was there any imputation, even of neglect, in a banker truſting to the apparent poſſeſſion of jewels by a goldſmith? Yet they were the property of another, and the banker ſuffered the loſs. It is received law, that a factor may ſell, but cannot pawn, the goods of his conſignor. *Patterſon* v. *Taſh*, 2 *Str.* 1178. The perſon therefore who took an aſſignment of goods from a factor in ſecurity, could not retain them againſt the claim of the conſignor; and yet, in this caſe, the factor might have ſold them, and embezzled the money. It has been argued, that it is neceſſary in commerce to raiſe money on goods at ſea, and this can only be done by aſſigning the bills of lading. Is it then nothing, that an aſſignee of a bill of lading gains by the indorſement? He has all the right the indorſer could give him; a title to the poſſeſſion of the goods when they arrive. He has a ſafe ſecurity, if he has dealt with an honeſt man. And it ſeems as if it could be of little utility to trade, to extend credit by affording a facility to raiſe money by unfair dealing. Money will be negotiable, in every caſe where there is a fair ground of credit: but a man of doubtful character will not find it ſo eaſy to raiſe money at the riſk of others.

The concluſions which follow from this reaſoning, if it be juſt, are, 1ſt, That an order to direct the delivery of goods indorſed on a bill of lading is not equivalent, nor even analogous, to the aſſignment of an order to pay money by the indorſement of a bill of exchange. 2dly, That the negotiability of bills and promiſſory notes are founded on the cuſtom of merchants, and poſitive law: but as there is no poſitive law, neither can any cuſtom of merchants apply to ſuch an inſtrument as a bill of lading. 3dly, That it is therefore not negotiable as a bill, but aſſignable; and paſſes ſuch right, and no better, as the perſon aſſigning had in it.

This laſt propoſition I confirm by the conſideration, that actual delivery of the goods does not of itſelf transfer an abſolute ownerſhip in them, without a title of property; and that the indorſement of a bill of lading, as it cannot in any caſe transfer more right than the actual delivery, cannot, in every caſe, paſs the property; and I therefore infer, that the mere indorſement can in no caſe convey an abſolute property. It may however be ſaid, that, admitting an indorſement of a bill of lading does not, in all caſes, import a transfer of the property of the goods conſigned; yet, where the goods when delivered would belong to the indorſee of the bill,

and



and the indorſement accompanies a title of property, it ought in law to bind the conſignor, at leaſt with reſpect to the intereſt of third parties. This argument has, I confeſs, a very ſpecious appearance. The whole difficulty of the caſe reſts upon it; and I am not ſurpriſed at the impreſſion it has made, having long felt the force of it myſelf. A fair trader, it is ſaid, is deceived by the miſplaced confidence of the conſignor. The purchaſer ſees a title to the delivery of the goods placed in the hands of a man who offers them to ſale. Goods not arrived are every day ſold, without any ſuſpicion of diſtreſs, on ſpeculations of the faireſt nature. The purchaſer places no credit in the conſignee, but in the indorſement produced to him, which is the act of the conſignor. The firſt conſideration which affects this argument is, that it proves too much, and is inconſiſtent with the admiſſion. But let us examine what the *legal* right of the vendor is, and whether, with reſpect to him, the aſſignee of his bill of lading ſtands on a better ground than the conſignee from whom he received it. I ſtate it to be a clear propoſition, that the vendor of goods not paid for may retain the poſſeſſion againſt the vendee; not by aid of any equity, but on grounds of law. Our oldeſt books conſider the payment of the price (day not being given) as a condition precedent implied in the contract of ſale; and that the vendee cannot take the goods, nor ſue for them, without tender of the price. If day had been given for payment, and the vendee could ſupport an action of trover againſt the vendor, the price unpaid muſt be deducted from the damages, in the ſame manner as if he had brought an action on the contract, for the non-delivery. *Snee* v. *Preſcot*, 1 *Atk.* 245. The ſale is not executed before delivery: and, in the ſimplicity of former times, a delivery into the actual poſſeſſion of the vendee or his ſervant was always ſuppoſed. In the variety and extent of dealing which the increaſe of commerce has introduced, the delivery may be preſumed from circumſtances, ſo as to veſt a property in the vendee. A deſtination of the goods by the vendor to the uſe of the vendee; the marking them, or making them up to be delivered; the removing them for the purpoſe of being delivered, may all entitle the vendee to act as owner, to aſſign and to maintain an action againſt a third perſon, into whoſe hands they have come. But the title of the vendor is never entirely deveſted, till the goods have come into the poſſeſſion of the vendee. He has therefore a complete right, for juſt cauſe, to retract the intended delivery, and to ſtop the goods *in tranſitu*. The caſes determined in our courts of law have

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confirmed this doctrine, and the ſame law obtains in other countries.

In an action tried before me at Guildhall, after the laſt Trinity Term, it appeared in evidence, that one Bowering had bought a caſk of indigo of Verrulez and Co. at Amſterdam, which was ſent from the warehouſe of the ſeller, and ſhipped on board a veſſel commanded by one Tulloh, by the appointment of Bowering. The bill of lading were made out, and ſigned by Tulloh, to deliver to Bowering, or order, who immediately indorſed one of them to his correſpondent in London, and ſent it by the poſt. Verrulez, having information of Bowering's inſolvency before the ſhip ſailed from the Texel, ſummoned Tulloh, the ſhip-maſter, before the Court at Amſterdam, who ordered him to ſign other bills of lading, to the order of Verrulez. Upon the arrival of the ſhip in London, the ſhip-maſter delivered the goods, according to the laſt bills, to the order of Verrulez. This caſe, as to the practice of merchants, deſerves particular attention; for the judges of the Court at Amſterdam are merchants of the moſt extenſive dealings, and they are aſſiſted by very eminent lawyers. The caſes in our law, which I have taken ſome pains to collect and examine, are very clear upon this point. *Snee* v. *Preſcot*, though in a Court of equity, is profeſſedly determined on legal grounds by Lord Hardwicke, who was well verſed in the principles of law; and it is an authority, not only in ſupport of the right of the owner unpaid, to retain againſt the conſignee, but againſt thoſe claiming under the conſignee by aſſignment for valuable conſideration, and without notice. But the caſe of *Fearon* v. *Bowers*, tried before Lord Chief Juſtice Lee, is a caſe at law, and it is to the ſame effect as *Snee* v. *Preſcot*. So alſo is the caſe of the *Aſſignees* of *Burghall* v. *Howard*, before Lord Mansfield. The right of the conſignor to ſtop the goods, is here conſidered as a legal right. It will make no difference in the caſe, whether the right is conſidered as ſpringing from the original property not yet transferred by delivery, or as a right to retain the things as a pledge for the price unpaid. In all the caſes cited in the courſe of the argument, the right of the conſignor to ſtop the goods is admitted as againſt the conſignee. But it is contended, that the right ceaſes as againſt a perſon claiming under the conſignee for a valuable conſideration, and without notice that the price is unpaid. To ſupport this poſition, it is neceſſary to maintain that the right of the conſignor is not a perfect legal right in the thing itſelf, but that it is only founded upon a perſonal exception to the conſignee,



ſignee, which would preclude his demand as contrary to good faith, and unconſcionable. If the conſignor had no legal title, the queſtion between him and the *bonâ fide* purchaſer from the conſignee would turn on very nice conſiderations of equity. But a legal lien, as well as a right of property, precludes theſe conſiderations; and the admitted right of the conſignor to ſtop the goods *in tranſitu* as againſt the conſignee, can only reſt upon his original title as owner, not deveſted, or upon a legal title to hold the poſſeſſion of the goods, till the price is paid, as a pledge for the price. It has been aſſerted in the courſe of the argument, that the right of the conſignor has, by judicial determinations, been treated as a mere equitable claim, in caſes between him and the conſignee. To examine the force of this aſſertion, it is neceſſary to take a review of the ſeveral determinations.

The firſt is the Caſe of *Wright* v. *Campbell*, 4 *Burr.* 2046, on which the chief ſtreſs is laid. The firſt obſervation that occurs upon that Caſe is, that nothing was determined by it. A Caſe was reſerved by the Judge at *Niſi Prius*, on the argument of which the Court thought the facts imperfectly ſtated, and directed a new trial. That Caſe cannot therefore be urged as a deciſion upon the point. But it is quoted as containing in the report of it an opinion of Lord Mansfield, that the right of the conſignor to ſtop the goods cannot be ſet up againſt a third perſon claiming under an indorſement for value and without notice. The authority of ſuch an opinion, though no deciſion had followed upon it, would deſervedly be very great, from the high reſpect due to the experience and wiſdom of ſo great a Judge. But I am not able to diſcover that his opinion was delivered to that extent, and I aſſent to the opinion as it was delivered, and very correctly applied to the Caſe then in queſtion. Lord Mansfield is there ſpeaking of the conſignment of goods to a factor to ſell for the owner; and he very truly obſerves,—1ſt, That as againſt the factor, the owner may retain the goods; 2dly, That a perſon into whoſe hands the factor has paſſed the conſignment with notice, is exactly in the ſame ſituation with the factor himſelf; 3dly, That a *bonâ fide* purchaſer from the factor ſhall have a right to the delivery of the goods, becauſe they were ſold *bonâ fide*, and by the owner's own authority. If the owner of the goods entruſt another to ſell them for him, and to receive the price, there is no doubt but that he has bound himſelf to deliver the goods to the purchaſer; and that would hold equally, if the goods had never been removed from the *warehouſe*. The queſtion on the right of the conſignor to



ſtop and retain the goods can never occur, where the factor has acted ſtrictly according to the orders of his principal, and where, conſequently, he has bound him by his contract. There would be no poſſible ground for argument in the Caſe now before the Court, if the Plaintiffs in the action could maintain, that Turings and Co. had ſold to them by the intervention of Freeman, and were therefore bound *ex contractu* to deliver the goods. Lord Mansfield's opinion, upon the direct queſtion of the right of the conſignor to ſtop the goods againſt a third party, who has obtained an indorſement of the bill of lading, is quoted in favour of the conſignor, as delivered in two Caſes at *Niſi Prius*; *Savignac* v. *Cuff*, in 1771, and *Stokes* v. *La Riviere* in 1785. Obſervations are made on theſe caſes, that they were governed by particular circumſtances; and undoubtedly, when there is not an accurate and agreed ſtate of them, no great ſtreſs can be laid on their authority. The Caſe of *Caldwell* v. *Ball* is improperly quoted on the part of the Plaintiffs in the action, becauſe the queſtion there was on the priority of conſignments, and the right of the conſignor did not come under conſideration. The Caſe of *Hibbert* v. *Carter* was alſo cited on the ſame ſide, not as having decided any queſtion upon the conſignor's right to ſtop the goods, but as eſtabliſhing a poſition, that by the indorſement of the bill of lading, the property was ſo completely transferred to the indorſee, that the ſhipper of the goods had no longer an inſurable intereſt in them. The bill of lading in that Caſe had been indorſed to a creditor of the ſhipper; and undoubtedly if the fact had been as it was at firſt ſuppoſed, that the cargo had been accepted in payment of the debt, the concluſion would have been juſt; for the property of the goods, and the riſk, would have completely paſſed from the ſhipper to the indorſee; it would have amounted to a ſale executed for a conſideration paid. But it is not to be inferred from that Caſe, that an indorſement of a bill of lading, the goods remaining at the riſk of the ſhipper, transfers the property ſo that a policy of inſurance upon them in his name would be void. The greater part of the conſignments from the Weſt Indies, and all countries where the balance of trade is in favour of England, are made to a creditor of the ſhipper; but they are no diſcharge of the debt by indorſement of the bill of lading; the expence of inſurance, freight, duties, are all charged to the ſhipper, and the net proceeds alone can be applied to the diſcharge of his debt. That Caſe therefore has no application to the preſent queſtion. And from all the Caſes that have been collected, it does not appear

[illegible] a decision against the legal right of the [illegible] to the goods *in transitu*, before the Court has [illegible] Court. When a point of law [illegible] general concern in the daily business of the [illegible] decided, the event of it fixes the public [illegible], directs the opinion, and regulates the practice of those who are interested. But where no such decision has in fact occurred, it is impossible to fix any standard of opinion, upon loose reports of incidental arguments. The rule therefore which the Court is to lay down in this Case, will have the effect, not to disturb, but to settle the notions of the commercial part of this country, on a point of very great importance, as it regards the security, and good faith of their transactions. For these reasons, we think the judgment of the Court of King's Bench ought to be reversed.

Rex *v.* Downs and Gowan, Esqrs.

The Defendants, being Justices of the Peace for the city and liberty of Westminster, convicted *R. Turner*, by virtue of the Statute 5 *Geo* III. *c.* 45 in the penalty of 40*s.* for selling Gin and Rum, being exciseable Liquors, without being duly licensed so to do. The Sessions upon Appeal quashed the Conviction subject to the opinion of the Court.

C A S E.

Turner, at his house in St. James, Westminster, sold Gin by retail. He produced a regular *Excise office* licence to sell *spirituous* liquors; and also an ale-house licence from two Justices of Westminster (R. B. Sheridan and G. Reid Esqrs.) in the usual form, to sell beer, ale, and *other exciseable* liquors, dated Sept. 20. 1788. But no notice was given by the High Constable of any meeting of Justices to grant licences on the day this licence was granted, nor any orders given by the Justices for that purpose. On the 20th of August, 1788, regular orders were given to the High Constable, to give notice of a *general meeting* of Justices to grant licences in the parish of St James, on the 11th of September following; in pursuance of which the Defendants and several other Justices met and granted licences: but no application was made by Turner for any licence at that meeting.

A statute, passed in 27 *Eliz.* ordained certain regulations for Westminster, namely, a division of the *City & Borough* into wards; an annual appointment of burgesses, to

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act as aldermen's deputies act in the city of London; but no magiſtrates were appointed, nor were the inhabitants incorporated. This act is ſtill in force. In the reign of *Cha.* II. Juſtices were aſſigned under the great ſeal, and from time to time ſince have been aſſigned to keep the peace within the liberty of the dean and chapter of the collegiate church of Saint Peter, Weſtminſter, the *city, borough, and town,* of Weſtminſter in the county of Middleſex, and Saint Martin's Le Grand, London; and certain letters patent iſſued under the great ſeal, dated 5th of Auguſt, in the 23d year of the preſent reign, directed (amongſt others) to the defendants and the two Juſtices, who granted the ale-houſe licence, aſſigning them to keep the peace within the liberty, &c. as above. The *city* and liberty of Weſtminſter is locally ſituate in the county of Middleſex. It has been cuſtomary ſince the ſtatute made in the 26th year of the reign of *Geo.* II. c. 31. in *many* diviſions of the ſaid *city* and liberty of Weſtminſter, to grant licences at *other times than at* the time preſcribed by that ſtatute as well as at the time and under the regulations of it.

Counſel in ſupport of the Order of Seſſions for quaſhing the Conviction, Mr. *Pigot* and Mr. *Garrow.*

In ſupport of the Conviction, Mr. *Erſkine* and Mr. *Shepherd.*

It appears by the Caſe above ſtated, that the conviction was made upon a preſumption that the licenſe granted to Turner by the two Juſtices, Sheridan and Reid, was *void,* not being granted at a general meeting convened and notified in the manner directed in the ſtatute of the 26 *Geo.* II. c. 31.

Mr. *Pigot,* in ſupport of the order of Seſſions upon which his Conviction was quaſhed, ſtated, 1ſt, that the ſtatute 5 *Geo.* III. *c.* 46. under which this conviction was made, extends only to ſelling ale, beer, &c. but not to *diſtilled ſpirituous* liquors; and 2dly, that *Turner* having an ale licenſe (which he contended was legally granted) and alſo an exciſe licenſe, he had juſtly incurred no penalty whatever. The COURT directed him to begin with the 2d objection firſt. He then ſaid, after premiſing that the Stat. 2 *Geo.* II. *c* 28. § 11. enacts that no licenſe ſhall be granted but at a general meeting of the juſtices of the diviſion where the perſon lives, on the 1ſt of Sept. or within 20 days after, or at any *other* general meetings of the Juſtices of the diviſion: but



pear that there has ever been a deciſion againſt the legal right of the conſignor to ſtop the goods *in tranſitu*, before the Caſe now brought before this Court. When a point of law which is of general concern in the daily buſineſs of the world is directly decided, the event of it fixes the public attention, directs the opinion, and regulates the practice of thoſe who are intereſted. But where no ſuch deciſion has in fact occurred, it is impoſſible to fix any ſtandard of opinion, upon looſe reports of incidental arguments. The rule therefore which the Court is to lay down in this Caſe, will have the effect, not to diſturb, but to ſettle the notions of the commercial part of this country, on a point of very great importance, as it regards the ſecurity, and good faith of their tranſactions. For theſe reaſons, we think the judgment of the Court of King's Bench ought to be reverſed.

REX *v.* DOWNS and GOWAN, Eſqrs.

The Defendants, being Juſtices of the Peace for the city and liberty of Weſtminſter, convicted *R. Turner*, by virtue of the Statute 5 *Geo* III. *c.* 46 in the penalty of 40s for ſelling Gin and Rum, being exciſeable Liquors, without being duly licenſed ſo to do. The Seſſions upon Appeal quaſhed the Conviction ſubject to the opinion of the Court.

CASE.

Turner, at his houſe in St. James, Weſtminſter, ſold Gin by retail. He produced a regular *Exciſe-office* licence to ſell *ſpirituous* liquors; and alſo an ale-houſe licence from two Juſtices of Weſtminſter (R. B. Sheridan and G. Reid Eſqrs.) in the uſual form, to ſell beer, ale, and *other exciſeable* liquors, dated Sept. 20, 1788. But no notice was given by the High Conſtable of any meeting of Juſtices to grant licences on the day this licence was granted, nor any orders given by the Juſtices for that purpoſe. On the 29th of Auguſt, 1788, regular orders were given to the High Conſtable, to give notice of a *general meeting* of Juſtices to grant licences in the pariſh of St James, on the 11th of September following; in purſuance of which the Defendants and ſeveral other Juſtices met and granted licences; but no application was made by Turner for any licence at that meeting.

A ſtatute, paſſed in 27 *Eliz.* ordained certain regulations for Weſtminſter, namely, a diviſion of the *City and Borough* into wards; an annual appointment of burgeſſes, on

act as aldermen's deputies act in the city of London; but no magiſtrates were appointed, nor were the inhabitants incorporated. This act is ſtill in force. In the reign of *Cha.* II. Juſtices were aſſigned under the great ſeal, and from time to time ſince have been aſſigned to keep the peace within the liberty of the dean and chapter of the collegiate church of Saint Peter, Weſtminſter, the *city, borough, and town,* of Weſtminſter in the county of Middleſex, and Saint Martin's Le Grand, London; and certain letters patent iſſued under the great ſeal, dated 5th of Auguſt, in the 23d year of the preſent reign, directed (amongſt others) to the defendants and the two Juſtices, who granted the ale-houſe licence, aſſigning them to keep the peace within the liberty, &c. as above. The *city* and liberty of Weſtminſter is locally ſituate in the county of Middleſex. It has been cuſtomary ſince the ſtatute made in the 26th year of the reign of *Geo.* II. c. 31. in *many* diviſions of the ſaid *city* and liberty of Weſtminſter, to grant licences at *other times than at* the time preſcribed by that ſtatute as well as at the time and under the regulations of it.

Counſel in ſupport of the Order of Seſſions for quaſhing the Conviction, Mr. *Pigot* and Mr. *Garrow.*

In ſupport of the Conviction, Mr. *Erſkine* and Mr. *Shepherd.*

It appears by the Caſe above ſtated, that the conviction was made upon a preſumption that the licenſe granted to Turner by the two Juſtices, Sheridan and Reid, was *void,* not being granted at a general meeting convened and notified in the manner directed in the ſtatute of the 26 *Geo.* II. c. 31.

Mr. *Pigot,* in ſupport of the order of Seſſions upon which this Conviction was quaſhed, ſtated, 1ſt, that the ſtatute 5 Geo. III. *c.* 46. under which this conviction was made, extends only to ſelling ale, beer, &c. but not to *diſtilled ſpirituous* liquors; and 2dly, that *Turner* having an ale licenſe (which he contended was legally granted) and alſo an exciſe licenſe, he had juſtly incurred no penalty whatever. The COURT directed him to begin with the 2d objection firſt. He then ſaid, after premiſing that the Stat. 2 *Geo.* II. *c* 28. § 11. enacts that no licenſe ſhall be granted but at a general meeting of the juſtices of the diviſion where the perſon lives, on the 1ſt of Sept. or within 20 days after, or at any *other* general meetings of the Juſtices of the diviſion: but



there is a *proviſo*, that nothing in that act ſhall extend to *alter the method or power* of granting ſuch licences in *any city* or town corporate. And that the 26 *Geo.* II. *c.* 31. *ſ.* 4. confines the time of holding the general meetings to the firſt 20 days of September; and the 16th ſection provides that nothing in that act ſhall extend to alter the *time or times* of granting ſuch licences in *any city* or town corporate.

The ſecond objection I have to ſtate is on theſe acts of the 2d *Geo.* II. and the 26th *Geo.* II. neither of which apply to the City of Weſtminſter, *city* being expreſsly within the exception of thoſe acts. The act of 26th had originally that proviſion which relates to this queſtion; and it might be matter of conſiderable doubt whether the exception in it is not confined to the time or times of granting licences only, and whether the other part of the proviſions could not equally extend to towns corporate and other places; but your lordſhip obſerves this act of the 26th is only ſupplementary to the 2d of *Geo.* II. and does not repeat the words concerning the method and power of licenſing, but only ſpeaks as to the time.

The act of the 2d of *Geo.* II. ſays, "Whereas many inconveniencies had ariſen from perſons being licenſed to keep ale-houſes by Juſtices of the Peace, who living remote from the places of abode of ſuch perſons, might not be truly informed as to the occaſion or want of ſuch ale-houſes; or the character of perſons applying for licences to keep the ſame."

It is obvious that the city of Weſtminſter is not within the inconvenience meant to be provided againſt by this clauſe; for in Weſtminſter, the commiſſion of the peace ſtated in this Caſe ſhews it is a local magiſtracy with no juriſdiction beyond the city and liberty. Is there any particular magic in a corporate office, as a Burgeſs, Jurat, or Juſtice of the Peace? They are aſſigned by the Crown to keep the peace within the limited juriſdiction, and as local Magiſtrates they licenſe, and are not within the inconvenience before mentioned; magiſtrates for Weſtminſter only, anſwer no part of the deſcription of magiſtrates living at a remote diſtance, who conſequently could not be acquainted with the character of perſons deſiring to be licenſed. This is not within the miſchief intended to be provided againſt. This act provides, "That no licenſe ſhall be granted to any perſon but at a general meeting of the Juſtices of the Peace, acting in the diviſion where the ſaid perſon dwells, to be holden for that purpoſe on the 1ſt day of September *yearly*, or within twenty days after." And adds, "Or



"at any other general meeting of the ſaid Juſtices, to be "holden for the diviſion wherein the ſaid perſon reſides." Then comes the Act of the 26th *Geo.* II. which makes no alteration in the law; nor altering it in any reſpect, except by repealing the clauſe of the 2d *Geo.* II. which ſays that the licenſe may be granted at *any other* general meeting; but the clauſe remains ſtill in force in which there is this proviſion, "Provided nothing therein ſhall extend to alter the method "or power of granting licences in any city or town corpo- "rate."

Now, if the conſtruction of the Court upon this proviſion is, that it muſt be a city or a town corporate, having a local magiſtracy, it is intended to be ſaid truly, your lordſhips are to ſupply the word corporate after city, and it muſt be a city corporate or a town corporate—You are to ſupply the word corporate, and to extend it to city as well as town. It can only be material in this Caſe, that there is a magiſtracy, with a local juriſdiction, acting in that city or town corporate.—But why, becauſe a magiſtrate is an alderman or burgeſs, he muſt be better qualified to grant licences, and better acquainted with the character of thoſe who apply, it is impoſſible to ſupply a reaſon. All the myſtery that can be in this clauſe is this: any city or town corporate, though in that city there ſhould be no corporate magiſtrates, if there be a local magiſtracy, moſt undoubtedly the Caſe is not within the miſchief intended to be prevented.

Then the queſtion is, Whether this exception extends to Weſtminſter, which is called a city in all acts and charters, and which was made a Biſhopric by Henry VIII. which moſt writers have conſidered as part of the definition of a city.

LORD CHIEF JUSTICE.—Every Biſhopric is not a city.

Mr. *Pigot*.— I do not apprehend it is.

LORD CHIEF JUSTICE.—In South Wales, there are four Biſhoprics, and neither of them a city.

Mr. *Pigot*.—Weſtminſter, if no Biſhopric, yet is a city: and it is clear that the city of Weſtminſter is not within the miſchief intended to be provided againſt, and falls within the expreſſion, as well as within the meaning and policy of the law. By the 2d *Geo.* II. the Juſtices might licenſe in September, or at any other *general meeting*. By the 20th of *Geo.* II. the legiſlature ſays, it has been found inconvenient to licenſe at any after meeting; and therefore you ſhall now no longer licenſe at any ſubſequent general meeting, but on the 1ſt of September only, or within twenty days after. All the 26th of *Geo.* II. altered, was the time, fixing it to



the 1ſt of September, or within twenty days after, and excluding the general meeting. Not meaning any part of this ſhould extend to towns corporate;—all that was neceſſary to the alteration then making, was to ſay, this ſhould not extend to alter the time or times of licenſing in cities and towns corporate; becauſe there is no inconvenience in licenſing where there is a local magiſtracy, the caſe ſtands in ſuch places exactly as it did in the 2d of Geo. II.

I hope the Court will allow me to mention the other objection which I firſt took, and which is fatal to this conviction; it is founded upon the 5th of Geo. III. and no other ſtatute; it is a conviction, in the ſum of forty ſhillings and the expences of conviction, which no other ſtatute gives them power to aſſeſs and apportion with the penalty. I confeſs it appears to me ſo clear, that it requires only ſhortly to review the Acts to prevent retailing ſpirituous liquors without licenſes, and compare them with other laws upon the ſubject. The Act of the 5th of Geo. III. does not introduce any new penalty, but it is a commutation of all the preceding pecuniary and corporal puniſhments. The Act ſays, the penalties and puniſhments of this Act are in lieu of all former ones. But the 9th Geo. III. ſets up again the old penalties for ſelling ſpirituous liquors, and ſuperſedes the Act of the 5th ſo far as it affects this offence.

The fact is, this Act, under which *Turner* has been convicted for ſelling gin, applies only to perſons ſelling *ale, beer, or other exciſeable* liquors, but not to diſtilled ſpirituous liquors; and it is clear the Juſtices have proceeded upon this ſtatute of the 5th of Geo. III. only, for they have uſed the ſummary form preſcribed in this ſtatute, and they have awarded coſts in the conviction which no other ſtatute authoriſes them to do.

Mr. *Garrow*.---My Lord, I am on the ſame ſide with Mr. Pigot. In the firſt place, as to the queſtion whether Weſtminſter is to the purpoſes of this Act, what from the time of paſſing the 26th of Geo. II. it has been underſtood to be, and acted upon as ſuch: that is, whether Weſtminſter continues ſtill to be a city in the ſenſe of the ſtatute, there ſeems to me no great doubt, when the terms come to be conſidered, of the licenſing acts together. It cannot be doubted when the Acts of the 26th of Geo. II. and the 2d of Geo. II. paſſed, the Legiſlature had it in contemplation to provide for the manner of granting licenſes in large extended counties. If you attend to the preamble which ſtates the *evil that has* ariſen, and is to be cured by it, if the enacting

clauſes



clauſes are attended to, it cannot be miſunderſtood. This caſe is not like a queſtion lately before the Court, between the Magiſtrates of the City of Carliſle and thoſe of a more extended juriſdiction, that ſay they have a concurrent juriſdiction in the city or town corporate, and have a right to come into that city and town corporate, and exerciſe juriſdiction; but this queſtion is, whether the Magiſtrates who granted this licence to Turner, and who were appointed by the Crown for ſome purpoſe or other, may not exerciſe their powers in their own local juriſdiction for the benefit of the public. In this caſe they are Magiſtrates by Letters Patent from the Crown, and exerciſing their functions preciſely in the way all Magiſtrates have carried them on ſince the 25th of Geo. II. under the proviſions in the Act, taking it downwards in an uninterrupted courſe to the time of this conviction. Though I do not contend that is an argument to bind the Court, it is nevertheleſs a weighty conſideration upon the expoſition of a doubtful ſtatute. At the time the Act paſſed, thoſe that attended as witneſſes to induce the Legiſlature to make thoſe proviſions, were good judges whether it extended to their city; they found, from that moment, the proviſions extended in terms to counties, and which are in terms excluded from a city and town corporate. The cotemporary arguments were, that Weſtminſter was not included in the enacting clauſes, but was in the exception to be found in the Act of Parliament. It has been ſaid that Weſtminſter is not a city; I own I was much ſurprized to hear that aſſerted. To prove that Weſtminſter is a city, I ſhall refer to *Coke's Littleton* 109, tranſcribed by Mr. Juſtice Blackſtone in his Commentaries 114, who ſays, "A city is a town incorporate, which is, or has been the "See of a Biſhop; and though the Biſhopric be diſſolved, "as at Weſtminſter, ſtill it remaineth a city."

LORD KENYON.---I believe that is hardly a definition, as it never was incorporated.

Mr. *Garrow*.—Mr. Juſtice Blackſtone ſays, as Weſtminſter is, though the Biſhopric be diſſolved, ſtill it remaineth a city. He ſays a city is a town incorporate.

LORD KENYON.---That is not the caſe of Weſtminſter; it is not incorporated. There is no incorporation; there never was.

Mr. *Garrow*.---There is a note in *Hargrave's* Edition of Coke upon this paſſage, which implies, that unleſs a borough is incorporated, it could not be a city. He ſays, "If "this is Lord Coke's idea, it is not quite accurate; though "the deſcription *may* be true, it is not univerſal." I can prove



prove that Weſtminſter is a city, from the 6th of Edward VI. There is a return of members to ſerve in parliament for Weſtminſter, from the 5th of January of that year, and downwards from that time the returns always ſpeak of them as citizens, burgeſſes, and inhabitants; and the writs conſtantly are directed to them by that deſcription, of the City of Weſtminſter. It ſhould ſeem to be a very forced conſtruction upon the terms of this Act to ſay, beſides being a city, it muſt be a town corporate to render it entitled to the exception. The Court are aſked to alter the terms of the Act of Parliament to expunge "*or*", and ſubſtitute "*and*," and not read it as the words oblige them to read it, *City and Town Corporate*, but you are to alter the meaning and force of the words in the Act, and ſay nothing can entitle any place to be within the exception, unleſs it be, a city and town corporate. The words of the Act are, "if a city or "town corporate, it ſhall be entitled to thoſe exceptions." The 2d of Geo. II. ſays, nothing in the Act ſhall extend to alter the method or power of granting licenſes in cities or towns corporate. As the 2d and 26th of Geo. II. are upon the ſame ſubject, it is fair to conclude, that the Legiſlature, in paſſing the 26th of Geo. II. had in contemplation the preceding Act. And when we look at the two Acts together, and find one ſpeaking of power and method, and the other ſpeaking of time, as not affected by the general proviſions of the Act, it is fair to ſay nothing in thoſe Acts extends to the time, power, or method of granting licenſes before practiſed in this City.

I muſt contend that the terms of the Act does not alter the method, the power, or the time. If I ſatisfy the Court, the method, power, and time uſed in cities and towns corporate, are not to be affected by general proviſions of the Act, and thoſe proviſions only extend to counties, I have ſucceeded in ſupport of the preſent licenſe, and, of courſe, it will quaſh the conviction.

LORD KENYON.---The Act ſays, there ſhall be a general notice of the time the Juſtices mean to do it. It appears in this very caſe of Weſtminſter, that the other Magiſtrates did on ſuch a day iſſue their warrant appointing a day for licenſing for this diviſion.

Mr. *Garrow*.---It is ſo; but your Lordſhip obſerves upon the face of this caſe, that uniformly from the 2d of Geo. II. to this time, the Juſtices thought they might grant it either way.

Mr. *Erſkine, contra.* May it pleaſe your lordſhip to favour me in ſupport of this conviction. Mr. Shepherd and I have



I have looked with attention over all theſe ſtatutes and taken much pains in examining them, and we both agree there is not the leaſt room for doubt upon thoſe acts I am going to refer to.

The firſt ſtatute in point of time is the 2d of Geo. II. c. 28, the common licenſing act, which ſays:

"Whereas inconveniences have ariſen from perſons being "licenſed by Juſtices who, living remote from the places of "abode of ſuch perſons, may not be truly informed as to "the occaſion or want of ſuch houſes, or the character of "the perſons applying for licenſes to keep the ſame: be it "therefore enacted that no licenſe ſhall be granted, but at "the general meeting of the Juſtices of the Peace acting in "the diviſion where the perſon dwells, to be holden for that "purpoſe in September yearly, or at any other general meet-"ing of the Juſtices to be holden for the diviſion wherein "the ſaid perſon reſides; and all licenſes to the contrary ſhall "be null and void."

The next ſtatute in point of time ſubſequent to the 2d of Geo. II. is the 9th of Geo. II. c. 23.

Your lordſhip will obſerve that the parliament had two diſtinct objects in view: one of the regulation of police, the other the revenue; and beſides the regulation of police and the revenue, they had an annexed object, which was the preſervation of the human ſpecies; ſuppoſing them to be much affected by the indiſcreet ſale of ſpirituous liquors of any ſort, they inflicted a penalty upon perſons ſelling under two gallons without firſt taking a licenſe.

The 9th of Geo. II. ſays, there ſhall be no ſpirituous liquors of any ſort ſold in leſs quantity than two gallons without an Exciſe Office licenſe. To enforce this law there is a penalty of one hundred pounds for retailing ſpirituous liquors without ſuch licenſe, and the ſame act, for the purpoſes ſtated in the preamble, namely, to prevent vice, and to prevent the immoderate uſe of ſpirituous liquors, inflicts a penalty of 5 l. upon any perſon who ſhall ſell any ſpirituous liquors or ſtrong waters, though he has ſuch *Exciſe Office* licenſe, unleſs he has alſo the Juſtices Licenſe to keep an ale-houſe.

The next ſtatute is the 16 Geo. II. c. 8. which enacts, that no perſon ſhall retail any diſtilled ſpirituous liquors without an exciſe licenſe under the penalty of 10 l.; that no ſuch exciſe licenſe ſhall be granted to any perſon that has not an Ale licenſe; and then follows the proviſo, that ſuch exciſe licenſe ſhall not enable any perſon to retail ſpirituous liquors, unleſs he be alſo licenſed by the Juſtices to

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ſell ale, beer, or other exciſeable liquors. The 29 Geo. II. c. 46, reſtrains the commiſſioners of exciſe from granting the licenſe for ſpirituous liquors, to any one who has not the Juſtices Ale licenſe. Then comes the 5 Geo. III. which ſays this: "Whereas, by the laws now in force, perſons "ſelling ale, or other exciſeable liquors by retail, without "licenſe, are liable and ſubject by different laws to dif-"ferent penalties and puniſhments, which has occaſioned "much confuſion (this applies to the Juſtices licenſes, there "was no confuſion in the exciſe laws); every perſon law-"fully convicted of ſelling ale or beer, or other exciſeable "liquors, by retail, after that day, without being duly li-"cenſed, ſhall inſtead and in lieu of the ſeveral pecuniary "and corporal puniſhments, forfeit for the firſt offence 40s. "4l. for the ſecond, and ſo on." And then there is given the form of the conviction under which a man is convicted.

Now the diſtinction always to be kept in view is, that where the Legiſlature ſpeaks of licenſes to ſell *ſpirituous* liquors, they mean the *Exciſe-Office* licence; and by the licence to ſell ale and other *exciſeable* liquors, the *Juſtices* licence is always meant. Now the confuſion alluded to in the preamble of the 5th of Geo. III. was occaſioned by the ſtatutes of the latter claſs; and the 5th of Geo. III. expreſsly ſays "that in lieu of the penalties inflicted by former Acts on retailers of ale and other exciſeable liquors, without licenſe, they ſhall forfeit 40s. &c. Now your Lordſhip will obſerve what produced the ſtatute of the 9th of Geo. III. the very thing Mr. Pigot ſtates, the very confuſion which was quoted; for it was doubted after the 5th of Geo. III. whether perſons having a *Juſtice's* licence, could be proſecuted for ſelling ſpirituous liquors without an *exciſe* licenſe. To remedy theſe doubts, the 9th of Geo. III. declares, that all penalties relating to the ſale of *ſpirituous* liquors (except a penalty of 100l. impoſed by the 9th of Geo. II.) might be levied and recovered, notwithſtanding the ſtatute of the 5th of Geo. III. The ſum therefore of theſe two ſtatutes is, that in lieu of the penalties which might before have been inflicted on retailers of *ſpirituous* liquors without a Juſtice's licenſe, though they had an exciſe licenſe, the penalty of 40s. and coſts is inflicted; but the Juſtice's licenſe is not hereby rendered the leſs neceſſary; and the exciſe licence, where the holder of it has no Juſtice's licenſe, is in the ſame predicament, ſince the paſſing this ſtatute, as it was before. For the ſtatute 9 Geo. III. ſays: in order to put an *end to doubts*, "be it enacted and declared, that all and every

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the powers, authorities, penalties, forfeitures, clauſes, &c. ſince the 8th of Geo. II. relating to the ſelling *ſpirituous* liquors by retail, without licenſe, except the penalty of 100 l. in the 9th of Geo. II. may be recovered; ſo that every one Act of Parliament which remains upon the record to puniſh perſons ſelling ſpirituous liquors without an exciſe licenſe remains in force, and the 100 l. would have been levied upon this man *Turner*, had he not that exciſe licenſe the caſe found him to have.

LORD KENYON.—Suppoſe the 2d of George II. cap. 28, which gives the Juſtices power to grant licenſes to ſell ale and brandy, was the only Act of Parliament that required a licenſe till the exciſe-law; ſuppoſe it required a penalty of 5 l. which is more than 40s. By the 5th of Geo. III. would that 5 l. be inflicted upon a perſon that ſhould ſell ſpirituous liquors? Could it, or could it not, notwithſtanding the 5th of Geo. III.? The 9th of Geo. III. ſays, all penalties ſhall be levied. Now could that penalty of 5 l. (I put it for exemplifying it) could that penalty of 5 l. be levied upon a perſon ſelling ſpirituous liquors.

Mr. *Erſkine*.---Undoubtedly it could not; the Act ſubſtituted 40s. in lieu of that. The 5th of Geo. III. is applicable to a Juſtice's licenſe only.

LORD KENYON.—The queſtion I mean to put is this: Suppoſe a penalty larger than 40s. inflicted on perſons ſelling ale, &c. without a Juſtice's licenſe; would this Act of the 5th of Geo. III. expounded as it is by the 9th of Geo. III. have left the perſon ſelling ſpirituous liquors, ſubject to that penalty of 5 l.

Mr. *Erſkine*.---No. Your Lordſhip obſerves, as I put the caſe, there was a penalty of 5 l. for ſelling beer and ale, or ſpirituous liquors, without a Juſtice's licenſe. By the 9th of Geo. II. cap. 23, there is a particular form of conviction given for it. Though you have an exciſe licenſe, which prevents your being liable to 100 l. ſtill if you do not take out a licenſe for the ſale of ale and ſpirituous liquors from two Juſtices, you ſhall forfeit 5 l. Now there is an end of that penalty; for the 5th of Geo. III. changes it, and puts an end to the 9th of Geo. II. which relates to the Juſtices licenſes.

LORD KENYON.---I take it for granted this form of conviction is to ſtand or fall upon the 5th of Geo. III. as applicable to this caſe. Is it not?

Mr. *Erſkine*.---Yes. It gave two convictions; one for not having an exciſe licenſe, and another of 5 l. for want of the Juſtice's licence, having over and above it an exciſe licenſe.

cenſe. Your Lordſhip ſees upon the 9th of George II. there are two penalties, one for ſelling liquors without an exciſe licenſe, for which there is the forfeiture of 100l. and one for ſelling without the licenſe of Juſtices, for which there is a form of conviction that is changed by the 5th of Geo. III. from 5l. to 40s. Then doubts ariſe upon exciſeable liquors going along with ale; that begets a doubt whether this was not the only Act of Parliament to have any force, both as to the ſale of ſpirituous liquors, and as to the ſale of ale; that brought forward the 9th of Geo. III.

LORD KENYON.—What penalties was he liable to prior to the 5th of Geo. III. for ſelling without a Juſtice's licenſe?

Mr. *Erſkine*.---5l. penalty.

LORD KENYON.—The argument upon the other ſide is, he is ſubject to that very penalty, and may be proceeded againſt upon that Act.

Mr. *Erſkine*.---I take the Act to be repealed by the 5th of Geo. III.

LORD KENYON.---Perhaps it would, if that ſtatute ſtood alone---but is it not ſet up by the 9th of Geo. III?

Mr. *Erſkine*.---No---The 9th of Geo. II. is repealed by the 5th of Geo. III. and not ſet up by the 9th of Geo. III.

Your Lordſhip obſerves in the 9th of Geo. II. the words are theſe:---when they ſpeak of exciſe licences, they always ſay ſpirituous liquors alone.---Your Lordſhip will obſerve the only thing the 9th of Geo. III. ſets up, is with reſpect to ſpirituous liquors, but it leaves the 5th of Geo. III. where it ſtood, with reſpect to the 5l. penalty.

The 9th of Geo. II. cap. 23, ſays, You are to take out a licenſe for ſpirituous liquors by itſelf——"No perſon or "perſons ſhall preſume."---Now this is the Act which gives the 5l. penalty for ſelling without licenſe from the Juſtices, and gives 100l. at the ſame time for not having an exciſe licenſe——It ſays "No perſon or perſons ſhall preſume "to retail ſpirituous liquors without taking out ſuch li-"cenſe."——There is a penalty of 100l. the exception of which is in the 9th of Geo. III. which ſays, they ſhall be all in force except this 100l.——Though you are diſabled from ſelling without the exciſe licenſe, you are not enabled to ſell without the aid of all the licenſes.——The 9th of Geo. II. cap. 20, ſays, "Provided, and it is hereby de-"clared, that nothing in this Act ſhall be conſtrued to en-"able any perſon or perſons to ſell any ſpirituous liquors "or ſtrong waters by retail, unleſs ſuch perſon or perſons "be firſt licenſed by two or more Juſtices of the Peace; then

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"it gives a penalty of 5l. and afterwards the form of conviction."——Your Lordſhip will obſerve the words, for the more eaſy and expeditious means of ſuppreſſing the houſes of ſuch perſons that ſhall preſume to ſell any beer, ale, wine and other liquors by retail without a licenſe; when they come to give the 5l. penalty, it is for ale, beer, cyder, and all *ſpirituous* liquors, and though you muſt take out an exciſe licenſe, which muſt be producible under the penalty of 100l. you are not enabled to ſell ſpirituous liquors without the Juſtices licenſe too; for the ſtatute ſays, if you ſhall preſume to ſell ſpirituous liquors, &c. without a licenſe from two or more Juſtices of the Peace, then you are to be convicted in 5l. and the form of the conviction is ſet up.

Then comes the 5th of Geo. III. which is a poſitive repeal of that ſtatute as far as relates to the 5l. It ſays, "Whereas by the laws now in force, perſons ſelling ale and beer, and other exciſeable liquors, are liable to ſuch and ſuch puniſhments, which have occaſioned much confuſion; for the prevention thereof, be it enacted that from and after the 5th of July, every perſon lawfully convicted of ſelling ale or beer, or other exciſeable liquors, without licenſe, ſhall forfeit 2l. inſtead and in lieu of all penalties by former acts." Then is not there an end of all the 5l. penalty? Is it a thing in doubt? Can it be ſaid, after reciting that nothing in that Act ſhall extend to enable one to ſell ſpirituous liquors without an ale licenſe, and if you do ſhall forfeit 5l. and you might have ſuffered corporal puniſhment under another Act, and other penalties under a third, that this relates to the exciſe licenſes? Doubts ariſe. What were they?

LORD KENYON.—I am completely converted. You need not go on any further---I was ſtrongly impreſſed with my opinion; but upon looking into all the Acts, I have a clear reaſon to alter it.

Mr *Erſkine*.---Then I will trouble your Lordſhip upon the other part of the caſe, which I apprehend may be ſtated in very few words. I firſt mean to ſay, that Weſtminſter is not within the exception of any act of Parliament, either of the 2d or 26th of Geo. II.

Firſt, it is not a city; at leaſt, it is not corporate, which it muſt be, to be within the meaning of the Act of Parliament. Then ſuppoſing it were a town corporate (which it is not), the Juſtices are bound, under the 26th of Geo. II. to purſue a different mode than in this inſtance; ſuppoſing, I ſay, in the exception of the Act. In reſpect to the firſt, Lord Coke is right in his law, as he generally is; but I never



never heard Lord Coke cited to ſupport a fact which was given up. Lord Coke ſays, in his definition, a city is a town corporate, which is at preſent, or hath been, the ſee of a biſhop; in which he is followed by Mr. Juſtice Blackſtone, which has been ſtated from the text of his Commentary. If I agree with Lord Coke, that it is ſo in law, the fact is not with him. Suppoſe Lord Coke ſaid, a city is a town corporate, which is or hath been the ſee of a biſhop, will that make it a city, or any other place a city? But you would ſay, this great man, that knows what goes to conſtitute a city, is unfortunate in this inſtance; becauſe it does not fall in the ſcope of his definition. It is clear this was not a city. There was an eccleſiaſtical juriſdiction till the time of Elizabeth—ſhe erects no ſort of corporation; but gives powers to the Dean and High Steward, without the power of government or ſucceſſion, or any thing that belongs to a corporation; and it has been given up and allowed, that Weſtminſter is not in that reſpect a city. It is a city by mere courteſy.---Then what is the objection? The 2d of Geo. II. has for its object to remedy the inconvenience found by the 5th of King Edward VIth. which enables any two Juſtices to licenſe an ale-houſe; and enacted, that no licenſe ſhould be granted but at a general meeting after public notice in September, or at *any other general* meeting. That was found extremely inconvenient. After the licenſing day marked out, thoſe that had any thing on their characters, and durſt not appear at that time, lay by for ſome jobb to be done at a ſubſequent packed meeting. The 26th of George. II. was made to cure that imperfection, and a general licenſing time was ſettled to be obſerved throughout all England by all Magiſtrates; and Juſtices have been ſubject to criminal juſtice for granting licenſes in other places, or at any other time.

It has been contended by both my learned friends, that this man's licenſe was good though not granted at the general meeting, becauſe there is an exception of cities and towns corporate. The meaning of the Legiſlature is this: Where a town is incorporate, it has Juſtices of its own, and an internal Magiſtracy. By its own bye-laws it might have a great number of wholeſome regulations for its internal police; and we do not mean, by this general regulation, to deſtroy the internal police of any Magiſtrates, which under the bye-laws they have means to make. My learned friend then cites Lord Coke and Mr. Juſtice Blackſtone, to prove that a city is in its definition a town corporate; differing in no *other reſpect*, but as it is or has been the ſee of a biſhop:

then,



then, for courteſy, it is put down as a city. The Act did not mean it for compliment of any place that had been a ſee of a biſhop. It would be abſurd to ſuppoſe that all vice was to be brought down by the ſhade of the biſhop hovering over the place where he once had a ſee. That was not the meaning of the Act of Parliament. The Legiſlature did not mean to interfere with cities and towns corporate; but I ſhould apply the adjective Corporate to both the ſubſtantives. I put this inſtance: Suppoſe depredations had been made on the perſons and properties of men in any city or place, by perſons coming in to plunder the inhabitants; and by the law made to prevent it in future there ſhould be regulations for ſuch towns, and a proviſion it ſhould not extend to cities or towns forfeited, having walls that might keep out thoſe ſtragglers---could it mean, that cities which had not walls, but had a biſhop, that that was ſufficient fortification for them, and were therefore not in the exception? So in this caſe we muſt underſtand cities corporate and towns corporate.

My argument in ſhort is this. If Weſtminſter is not within the exception of the ſtatute, not being a corporate city; then I ſay the licenſe was not granted in the form required by the Act. But allowing that it is a city within the exception; yet that exception only goes to the *time* of licenſing, and the other regulations of the ſtatute muſt be complied with in all places. This licenſe therefore not being granted at a general meeting convened by public notice, the licenſe is void, and the conviction of courſe muſt be held good.

LORD KENYON, C. J.--On hearing the argument againſt this conviction, I thought the ſtatute 9 *Geo.* III. *c.* 6. was a parliamentary expoſition of the 5 *Geo.* III. *c.* 46. ſo as to exempt all perſons who ſold ſpirituous liquors by retail from the operation of the latter, on which this conviction is founded. But I am now clearly of a different opinion, on the argument urged in ſupport of the conviction, that there is a difference in the whole purview of theſe ſtatutes between *the Juſtice's licenſe* and *the licenſe from the exciſe*. The ſtatute 5 *Geo.* III. *c.* 46. applies to all thoſe inſtances where a licenſe for ale, beer, or *other exciſeable liquors* is required; and the conviction of the party offending againſt that act may be in the compendious form there pointed out, and adopted in this Caſe. And I am of opinion that that ſtatute remains in force, notwithſtanding the 9 *Geo.* III. *c.* 6. as to all the objects of the *licenſe* to be granted by the *Juſtices of the Peace*. For the doubts, which the Legiſlature wiſhed



to remove, when they paſſed the 9 *Geo.* III. were relative to the *exciſe licenſe* for retailing ſpirituous liquors. I did not know till it was pointed out at the bar that the Juſtices of the peace had the power of granting licenſes for ſelling ſpirituous liquors; but I am now ſatisfied that they have under the 2 *Geo.* III. *c.* 26. As to the other point; if it depended on the queſtion whether or not Weſtminſter be a city, I am not prepared to give any opinion on it. But the ground on which I rely is, that, whether it be a city or not, all the regulations preſcribed by the 26 *Geo.* II. *c.* 31. muſt be complied with, except ſo much of them as comes within the ſubſequent *proviſo*. Now that *proviſo*, on which ſo much ſtreſs has been laid, only extends to the *time or times* of granting the licenſes in thoſe particular diſtricts. Such is the conſtruction which the very words of the exception expreſs; and which is a conſtruction highly advantageous to the Public. For it is of importance to the Public that licenſes of this ſort ſhould be granted openly, and not by ſtealth, in order that they may have an opportunity of objecting to the granting of theſe licenſes to particular perſons on the ground of unfitneſs. Inaſmuch therefore as the regulations of that ſtatute were not complied with in this inſtance, this licenſe having been granted at a *private meeting* of two Juſtices, which was holden too after the general meeting was paſſed, I am of opinion that the licenſe is illegal, and that it cannot protect the perſon to whom it was granted from the penalties of the 5 *Geo* III. *c.* 46; and that the preſent form of conviction may be ſupported.

ASHHURST, J.---The principal queſtion is involved in ſome intricacy; but all the Acts of Parliament appear reconcileable by conſidering that the ſtatute 5 *Geo.* III. *c.* 46 ſolely and purely relates to *licenſes granted by the Juſtices of the Peace*, and not to licenſes granted by the *exciſe*. But ſome doubts having ariſen on the conſtruction of this act the 9 *Geo.* III. was paſſed, not to repeal any part of the former act, but to declare that the 5 *Geo.* III. was not intended to, and did not, do away the operation of any of the former laws relating to *exciſe licenſes*, and that they ſhould remain in the ſame force as they did before the 5 *Geo.* III. but with reſpect to *Juſtices licenſes*, the 5 *Geo.* III. was intended to repeal all former penalties, by ſubſtituting a penalty of 40 s. in their ſtead, and preſcribing a general form of conviction. As to the other point; I entirely concur in the opinion which has been given by my Lord. I think it would be a *moſt* miſchievous expoſition of the ſtatute 26 *Geo.* II. to ſay *that Juſtices* of the Peace even in ſuch places as fall within

the meaning of the exception might grant licenſes *privately*, and without giving any public notice of their intention to grant licenſes on any particular day. For though perhaps it was not neceſſary that ſuch magiſtrates ſhould be limited to *the time* mentioned in the Act for granting licenſes, yet as the Public are ſo much intereſted in the ſubject, the Legiſlature thought it proper to include *all places* in the general proviſions of the Act; ſo that in no place whatever can the Juſtices grant a licenſe but at a *public meeting*, though in places within the exception of that Act *the time* of that meeting is not confined to the 20 firſt days of September.

BULLER, J.—It is neceſſary that a perſon ſhould have two licenſes to enable him to ſell ſpirituous liquors; and therefore it is material to aſcertain with preciſion the terms which the Legiſlature have uſed in ſpeaking of both theſe; and when the terms are aſcertained, there is an end of the queſtion. From the argument which has been urged in ſupport of the conviction, it is clear that when the Legiſlature ſpeak of a licenſe to ſell *ale, beer, or other exciſeable liquors*, they mean a *Juſtice's licenſe*: when they mentioned a licenſe to ſell *ſpirituous liquors*, or *diſtilled liquors*, they mean an *exciſe licenſe*. If ſo, the licenſe to ſell ale, beer, or *other exciſeable liquors*, mentioned in the 5 *Geo.* III. means a *licenſe by the Juſtices*; and the 9 *Geo.* III. which ſpeaks of *licenſes to ſell ſpirituous liquors*, leaves the *Juſtices' licenſe* untouched, and only declares that the Legiſlature did not intend in paſſing the 5 *Geo.* III. to interfere with the *exciſe licenſe*; and conſequently the penalty of 40s. given by the 5 *Geo.* III attaches on perſons who retail ſpirituous liquors without a licenſe from the Juſtices.

The next queſtion is, Whether Weſtminſter be or be not a city within the meaning of the exception of the 26 *Geo.* II.; for it is not neceſſary to determine generally whether it be a city or not. But ſuppoſing it to be a city, I think it is clearly not within the meaning of this *proviſo*. For in common grammatical conſtruction, if there be two ſubſtantives, and one adjective, which may apply to both, it muſt be taken as referring to both. Or if this be conſidered on the reaſon of the thing, the queſtion is equally clear. If king Charles the Second had never granted a commiſſion of the peace for Weſtminſter, the licenſes there muſt have been granted by the Middleſex Juſtices; and then Weſtminſter would have been preciſely within the miſchief which the Legiſlature were deſirous of remedying by the 26 Geo. II.; for *Juſtices living at any diſtant* part of the country might have



have granted licenſes for this place. Then what is charter of Charles the Second? It is not a commiſſio city Juſtices; but to enable certain perſons to act in commiſſion of the peace "within the liberty of the dean chapter of the collegiate church of Saint Peter, Weſtmin the city, and borough, and town of Weſtminſter in county of Middleſex, and Saint Martin's le-grand, Londo Theſe therefore are not *city magiſtrates*. On the fair c ſtruction of the *proviſo* in the 26 *Geo.* II. it appears that Legiſlature did not wiſh to interfere with cities and to corporate, which are governed by regulations of their o as to *the time* of granting licenſes.

GROSE, J.—This conviction may be ſupported u the 5 *Geo.* III. *c.* 46.; for the 9 *Geo.* III. enacts and decl that all penalties, &c. impoſed on perſons retailing ſpiritu liquors without licenſe might have been, notwithſtan the 5 *Geo.* III. and may be (except as herein after m tioned) for the future recovered, &c. This ſeems to to be a declaratory law; ſaying that the exciſe licenſes v to remain as they did before that act; and that the c alteration which the 5 *Geo.* III. *c* 46. made was with reſ to the licenſes granted by the Juſtices. And this is confir by the ſubſequent *proviſo*, which ſays that all the powers authorities by the former acts to the Juſtices of the Peace the commiſſioners of exciſe reſpectively given, of tranſport or whipping perſons convicted of retailing ſpirituous liq without licenſe, ſhall ceaſe and be no longer put in fo Now that *proviſo* directly points to the powers which *magiſtrates* had relative to the licenſes for ſelling ſpiritu liquors. Therefore it is clear that the ſtatute 9 *Geo.* III. did not mean to interfere with the *Juſtices licenſes*. the diſtinction which has been taken between the licenſe the Juſtices and the licenſes by the commiſſioners of exc as applied to theſe Acts of Parliament, renders the queſ more clear. With reſpect to the other point: I can think that Weſtminſter is a city within the *proviſo* in the *Geo.* II.; which only means ſuch a city or town corpo as by virtue of its incorporation had a power of doing which the Magiſtrates for the county at large had within body of the county. But even ſuppoſing this to be a within the *proviſo*; ſtill the magiſtrates of ſuch a place m purſue the regulations of the 26 *Geo.* II. except as to *time* of granting ſuch licenſe: and the objection to this lic is not to *the time*, but to the *manner and place* in whic was granted.

Order of Seſſions quaſhed, and the conviction affirm

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THE LAWYER'S AND MAGISTRATE'S MAGAZINE.

For APRIL, 1790.

Adjudged Caſes in the Courts at Weſtminſter in the laſt Term.

TATE *v.* WELLINGS.

THIS was an action of debt on a bond; but the debt having ariſen out of a loan of money, the produce of ſtock ſold at the time for the purpoſe of this loan; and the borrower being bound to replace the ſtock in 12 months, or afterwards to repay the money advanced, together with ſuch intereſt as the dividends on the ſtock would, in the mean time, have produced; the dividends, in point of fact, amounting to more than the legal intereſt of the money advanced, the defendant craved oyer of the bond, and alſo of the condition. The caſe ſtated, that the defendant having occaſion for money, applied to his uncle, (ſince deceaſed, and to whom the plaintiff is executor) to lend it; which the uncle complied with, but told him, as he muſt diſpoſe of 74 l. 10s. ſhort annuities, he ſhould expect the ſame annuity as they now produced, and that the ſtock ſhould be replaced in one year; and, if not replaced at that time, the defendant was to repay 912 l. 12s. 6d. the ſum at which the ſtock was ſold for the purpoſe of this loan; to this the defendant agreed, and alſo to pay the above-mentioned annuity during the time, which amounted, in fact, to 8½ *per cent.* upon the ſum advanced. The ſtock was not tranſferred to the defendant, but the uncle gave orders to his



broker to ſell it, which was done; and the exact paid the ſame day to the defendant.

After the death of the uncle, the defendant nc fulfilled his agreement either of replacing the ſtc expiration of the year, or of repaying the money ſequent day named in the bond; his executors co the account of principal and intereſt, deducting a 200 l. left by the uncle to the defendant, and took for the balance. Upon which ſecond bond this a brought; and the queſtion was, whether the origi action was uſurious or not.

Upon the trial, Lord Kenyon had left it to the Ju whether this was intended *bonâ fide*, as a loan of whether that part of the tranſaction was a mere c taking more than the legal intereſt. The Jury foun loan of ſtock, and gave their verdict for the plaintif

Erſkine, againſt the rule for a new Trial, ſaid, t of ſtock to be again replaced, if the intereſt take more than the dividends would have produced, might be greater than legal intereſt for the money happened to be ſold for, ſtill it was a legal tra becauſe the lender ran the riſk of any ſubſequent f ſtocks, or, in other words, his principal was a The only ground therefore on which this tranſact be impeached was, that the affair of the ſtock was a lour and device for getting an exorbitant intereſt; trary of which the Jury have found by their verd further urged, that this application for a new trial on another ground, namely, that the plea ſtatec bearance to be until the expiration of the firſt year ſtock was to be replaced, whereas it ſhould have *alternative* time at which the money was to be paic the ſtock was not ſo replaced; elſe the evidence agree with the record. And though there is ano ſtating the forbearance to be until the time fixed f payment in money, yet as that plea neither has ſtat ternative, the defect is not cured.

It was contended, on the other ſide, in ſuppo rule, that though the loan of ſtock was legal, and had found, by their verdict, that the tranſaction mere colour for the uſury in the firſt inſtance, y plaintiff was, after the expiration of the time that might have been replaced, receiving more than the intereſt of the money while his principal was ſubj contingency or hazard, this part of the tranſaction w uſurious.

LORD KENYON, C. J.—It has been argued by the plaintiff's counsel that we are precluded from considering whether or not the first contract were usurious, because, admitting it to be so, it was merged in the second bond. But as the former bond was the consideration of this, on which the present action is founded, if that were void, as being given for an usurious consideration, most undoubtedly this second bond would be also void. The principal question therefore seems to be, whether the original transaction were or were not usurious. With respect to one part of the argument, that there was no loan of stock to the defendant, there is no doubt whatever. It is true that there was no actual transfer of stock to the defendant *in fact*, though there was *in substance*. For it appeared by the evidence that the stock was sold on the first of September, and that the produce was paid to the defendant himself on the same day. The transfer of the stock itself was never in the contemplation of the parties, and would not have answered the end proposed; but it must be virtually considered as a loan of stock. Now it is admitted that a mere loan of stock is not usurious, nor the payment of the dividends in the mean time, though they exceed the legal rate of interest. In this case it is clear that the loan was originally a loan of stock during the first year, because the party borrowing it had it in his power to re-place the stock itself, if he had chosen. During that period, therefore, there was nothing illegal in the transaction. But I have had some doubt in my mind, in the course of the argument, whether, as the defendant had no power to re-place the stock after the expiration of the year, it did not become a loan of money from that time, with a reservation of usurious interest, and that the pretence of transferring the stock, was merely a colour for the usurious transaction. But my doubt is now removed; for this case ought not to have a colour imputed to it, which is expressly negatived by the finding of the Jury. If then this transaction were legal during the first year, is there any thing superadded to make it usurious? I think not. The whole appears to have been a fair transaction.

I am also of opinion that the objection on the ground of the variance has great weight. One of the pleas states it as an *absolute* forbearance till the first of September 1785: but this is not a true narrative of the transaction between the parties; for in one event indeed it was a forbearance till that day, but in another event, at the defendant's option, it was till a subsequent day. The same observation also applies to the other plea, which states the forbearance till the first of



January, 1786: whereas it was not an abſolute forbearance either till the one day or the other, but in the alternative. Therefore on this ground alſo I think the plaintiff is entitled to retain his verdict.

ASHHURST, J.—The queſtion is, whether this tranſaction was merely colourable, and intended as a loan of money, upon which uſurious intereſt was to be taken, or a loan of ſtock. It appeared from the evidence that in ſubſtance this was a loan of ſtock. The agreement was, that the defendant ſhould have the uſe of the money, which was the produce of the ſtock, paying the ſame intereſt which the ſtock would have produced, with liberty to re-place the ſtock on a certain day, till which time the lender was to run the riſk of the fall of the ſtocks; but he ſtipulated that, if it were not re-placed by that time, he would not run that riſk any longer, but would be re-paid the ſum advanced at all events. And from this contract he derived no advantage, for he was only to receive, in the mean time, the ſame intereſt which the ſtock would have produced. Now though this might have been uſed as a colour for uſury, it was a queſtion for the conſideration of the Jury, and they have negatived it.

BULLER, J.---If the defendant fail either in the manner in which he has charged the uſury, or on the merits, the plaintiff muſt ſucceed. Now I think he has failed in both. As to the firſt, the contract is in the *alternative:* in both the pleas it is ſtated to be an *abſolute* forbearance till a *certain day*; but the proof is only of an *eventual* forbearance till *either* of thoſe days. On the principal queſtion alſo I think the plaintiff is entitled to retain his verdict. This has been aſſimilated to an action on the ſtatute for uſury: but I think it is different. Here the defence ſet up is, that the contract itſelf was illegal; and in order to ſupport it, it muſt be ſhewn that it was uſurious at the time when it was entered into; for if the contract were legal at that time, no ſubſequent event can make it uſurious. Now here we are precluded by the finding of the Jury; they were to conſider whether or not this was a mere cloak for uſury, and they have drawn their concluſion, which I think on the circumſtances of this caſe is the right one. This is not like the caſe cited from Cro. Jac. where the principal was at all events ſecure; for here the teſtator might have been a loſer in the event of the ſtock riſing after the firſt year.

Rule diſcharged.

UTTER

UTTERSON *v.* VERNON, *Aſſignee of* ELIZABETH TYLER, *a Bankrupt.*

This was an iſſue out of Chancery; and upon the trial before Lord Kenyon, a verdict was found for the plaintiff, ſubject to the opinion of the Court. The Caſe was,

The plaintiff lent the bankrupt 10,000 l. 3 *per cent.* annuities, which ſhe engaged to replace, but at no fixed time, and to pay the amouut of the dividends in the mean time. About five years after ſhe became a bankrupt, never having replaced the ſtock; the queſtion was, whether the plaintiff could prove under the Commiſſion the price of the ſtock, and at what time the price ſhould be taken, the value being on the day the act of bankruptcy was committed 57⅛, and at the time the commiſſion was iſſued 70⅝.

LORD KENYON, C. J.---This is a queſtion of ſome novelty, and of conſiderable difficulty; and, though I do not ſay but that ſome doubt may be formed on it, I am of opinion with the plaintiff. This is an iſſue directed out of the Court of Chancery, to try whether the bankrupt was indebted to the plaintiff in any, and what ſum of money, in reſpect of ſome ſtock which the plaintiff gave her a power of attorney to ſell out of the funds. The produce of that ſtock increaſed the property of the bankrupt. And the queſtion is, whether or not this created a debt to the plaintiff, ſo as to be capable of being proved under the commiſſion. Now where it is perfectly contingent whether or not a debt will become due, or where the demand ariſes on account of ſome tortious act, in neither of thoſe caſes can the debt be proved. But the rule with regard to demands payable at all events on a future day, though the amount of them is uncertain, falls under a different conſideration. Where a father covenants that he will make a proviſion for his wife and children, and becomes a bankrupt, that cannot be proved as a debt under the commiſſion, though the amount of it be ſpecified, *unleſs* he has ſtipulated to do it within a reaſonable time, and given *a bond* for the performance of it, which *is forfeited at law:* for then, uncertain as the ſum is, the Court of Chancery, proceeding on the rules of law, will order a part of the effects to be ſet apart to ſecure it; therefore *the mere uncertainty* of the ſum, provided there be a *legal remedy* before the bankruptcy happens, will not deprive the creditor of relief under the commiſſion. The caſe of *Dutch v. Warren*, though different in one reſpect from the preſent, goes a great way to ſupport the plaintiff's argument. It

differs



differs indeed in this reſpect, that in that caſe *a ſpecific day was mentioned* on which the ſtock was to be tranſferred; but that caſe anſwers the argument urged on the ground of uncertainty, for the amount of the damages in that caſe was not more certain than in the preſent; they both depend on the ſame denomination of property. I cannot forbear alluding to, and laying conſiderable ſtreſs on, the ſtatute 7 Geo. I cap. 31, though it does not meet this very caſe. That act, after reciting that doubts had ariſen whether bills, bonds, &c. payable at a future day, could be proved under the commiſſion, enacted and *declared* that they might. Now it is to be obſerved that the word "*declare*" is always inſerted in acts of parliament with great caution, and it does not occur in any other of the bankrupt laws. This therefore was declaratory of the common law; and the common law would probably have been held to apply to this caſe as well as to thoſe mentioned in the ſtatute, if it had been clear what the common law was. For here (not money indeed, but money's worth was lent by the plaintiff to the bankrupt, to be recovered on the ground of the contract, and not in a tortious action. The plaintiff had a cauſe of action which he might have enforced when he choſe, and not at the option of the bankrupt. I am therefore of opinion that in this caſe the plaintiff has a right to come in under the commiſſion for a ſatisfaction; and the only remaining queſtion is, what ſhall be the amount of that ſatisfaction, which depends on the time when the price of the ſtock is to be taken. Now I have no difficulty in ſaying that it ought to be computed on the day of the bankruptcy, which was the laſt poſſible time; and it is found by the caſe, that the value of the ſtock on that day was 5,750*l*. Therefore it ſeems to me, without making any innovation on any of the principles of law, that the plaintiff is entitled to prove that ſum under the commiſſion; and there appears to be no ground for deciding this to be uſurious, as was argued, the whole being a *bonâ fide* contract for the loan of ſtock. This is not like the caſe put at the bar, of an action for not performing a contract for the delivery of goods; for that ſounds merely *in damages*, and there is nothing to guide the judgment of the Court: but here the price of the ſtock is the criterion, and it is capable of being reduced to a certainty.

ASHHURST, J.---Although the inclination of my mind would induce me to ſay that debts, which ought in juſtice to be proved under a commiſſion of bankrupt, might be ſo proved, yet I have great doubt on admitting the preſent.

I have

I have always underſtood it to be a general rule that nothing is proveable under a commiſſion that cannot be recovered in the form of an *indebitatus aſſumpſit*; and that wherever it is neceſſary to have recourſe to a *ſpecial action on the caſe, or treſpaſs, to recover damages*, the party cannot come in under the commiſſion. As to the action for meſne profits, though *in form* it is an action of *treſpaſs*, yet *in effect* it is to recover the *rent*, which is at leaſt as certain in its nature as the ſtock in this caſe. It is true there may be ſome caſes where the Jury are not bound by the amount of the rent, but may give extra damages. But why may not the plaintiff in that caſe wave the extraordinary damages, if he pleaſe, and reſt content with the rent alone? and yet, in ſuch a caſe, he cannot come in under the commiſſion. The form of the action then, in which this demand was to be recovered, ſeems material in this caſe as well as in that. I cannot therefore at preſent bring myſelf to think that the plaintiff ought to be permitted to prove his demand under the commiſſion.

BULLER, J.— I cannot by any means agree that the form of the action can decide this queſtion which ariſes on the bankrupt laws. The form of the action very properly decided the caſe of *Goodtitle* v. *North*; but that has no application to the queſtion in this ſtage of it. There the action was brought to recover damages, and there were no means by which the Court could aſcertain the amount of them; they were uncertain in their nature, depending on a variety of circumſtances to be ſubmitted to the conſideration of a Jury, who alone could aſcertain them. And therefore there is great weight in what Lord Manſfield ſaid; for he thought that the only difficulty aroſe from the nature of the action which the plaintiff had brought, *which was for damages*. But the rule is this, if the creditor wiſh to prove a debt under a commiſſion of bankrupt, it is neceſſary that he ſhould be able to aſcertain the amount of it without the intervention of a Jury: and if it be ſo certain that he can ſwear to it, he is entitled to prove it under the commiſſion. In ſome caſes the form of the action is material, in others not. If money be levied by the ſale of goods under an execution, and the execution be afterwards ſet aſide, there if the party, whoſe goods have been ſeized, inſiſt on contingent damages for keeping him out of his goods and ſelling them, it cannot be proved as a debt under the commiſſion: but if he demand only the value of the goods, he may come in under the commiſſion, becauſe the debt is capable of being aſcertained, and he may ſwear to the amount of it. So, the caſe put at the bar, of an action for not delivering goods according



cording to an agreement, admits of the ſame diſtinction; if the party has actually paid for the goods, there he may recover the preciſe value in caſe of non-delivery, and conſequently may prove it as a debt under the commiſſion: but if he will not be content with recovering the preciſe value of them, but goes for contingent damages, ariſing from the fluctuation of the market, he cannot come in under the commiſſion, becauſe thoſe damages are uncertain. There is alſo another caſe, which ſhews that the form of the action is not the criterion. Suppoſe money has been lent on intereſt, and the principal has been paid, and the only point in diſpute be on the intereſt, *indebitatus aſſumpſit* will not lie for it *eo nomine* as intereſt, but the party muſt have recourſe to a ſpecial action on the caſe to recover it; and yet, as the amount of the intereſt is a matter of computation, he may prove it as a debt under the commiſſion. Beſides which, I am alſo of opinion that this caſe falls within the principle and good ſenſe of the ſtatute 7 Geo. I. cap. 31, though not within the very words of it. The object of that act was that all demands, that exiſted prior to the time of the bankruptcy, though not payable till a future day, might be proved under a commiſſion of bankrupt, *provided they were capable of being aſcertained.*

GROSE, J.—I have had conſiderable difficulty in forming my opinion on this caſe, becauſe it is perfectly new: but, on conſidering the juſtice of this caſe, and the principles of former deciſions, my doubts are removed. Where a demand reſts merely in damages, and is not capable of a clear certain liquidation, it cannot be proved under a commiſſion of bankrupt: but I conſider this as a contract to do a ſpecific act, which the bankrupt is rendered utterly incapable of performing by the bankruptcy; and his incapacity to perform it is attended *with a certain damage* to the plaintiff. The value of the ſtock is mixed in the general maſs of the bankrupt's property, of which the aſſignees and the other creditors are poſſeſſed; and there is no reaſon why in ſubſtantial juſtice the plaintiff ſhould not have the ſame advantage which the reſt of the creditors have, eſpecially as the amount of his demand is capable of being aſcertained. Several caſes have been mentioned, the principles of which fully warrant us in deciding in favour of the plaintiff. I perfectly concur with my Lord Chief Juſtice in the obſervations which he has made on the caſe of Dutch and Warren, and in thoſe made by my brother *Buller* on that of *Goodtitle* v *North*. Much has been ſaid reſpecting the form of the action; but I do not, by any means, think it concluſive;

cluſive; it may illuſtrate, but cannot decide, the queſtion. On the whole, I am of opinion that, this being a caſe of clear liquidated damages for the not performing a ſpecific act, which the bankruptcy has rendered impoſſible to be done, the plaintiff may come in under the commiſſion, and the time of the bankruptcy is the time when the amount of it is to be aſcertained by the price of the ſtock on that day.

By the Court. Enter the verdict for the plaintiff for the price of the ſtock on the day of the bankruptcy.

JACKSON *v.* DUCHAIRE.

The defendant took a houſe of the plaintiff, in which there were goods which ſhe got a friend to lay down the money for. This friend bargained with the plaintiff to buy the goods at 70l. and took a bill of ſale of them to himſelf. But the defendant made a private agreement, unknown to the friend, to pay 30l. more than he had agreed for, and for this money ſhe gave notes of hand to the plaintiff. Upon theſe notes the action was brought.

LORD KENYON ſaid upon the trial, that he thought the plaintiff was not entitled to recover, becauſe the agreement upon which theſe notes were given, was a fraud upon the friend who had advanced the 70l. to the defendant in confidence that it was the whole conſideration. But the Jury, notwithſtanding, gave a verdict for the plaintiff.

This was a motion to ſhew cauſe why the verdict ſhould not be ſet aſide.

ASHHURST, J.---I perfectly concur in the opinion given by my Lord at the trial. It is clear both on the principles of law and equity that when any friend advances money to relieve another perſon from the preſſure of his neceſſities, and the parties intereſted enter into a private agreement over and beyond that with which the friend is acquainted, ſuch agreement is void in law, as being a fraud on ſuch friend. This caſe is ſimilar in its principle to one, which was determined in this Court not long ago. Here it is to be obſerved that Welch, (the perſon who advanced the money) who was deſirous of benefiting his friend, agreed to advance 70l. which he underſtood to be the *full purchaſe money*? for ſuch was the repreſentation made to him, and 70l. is expreſſed in the bill of ſale to be the conſideration. But now it turns out that the defendant was to give two promiſſory notes for a further ſum, under a private agreement between her and the plaintiff, to which Welch was not privy,



privy, and which, if he had known, he would not probably have advanced his money. This therefore was a fraud on him; and the principles of analogous cases go to shew that this private agreement between the plaintiff and the defendant cannot be enforced. It has been attempted to distinguish this case from them by saying that Welch had a consideration for his money in the goods: but that does not vary the case; for he did not wish to make a bargain for himself, but acted solely for his friend. And even if it be considered that Welch has purchased goods for himself of greater value than 70 l. and has only paid 70 l. himself, then it appears that the defendant had *no consideration* whatever for her notes.

BULLER, J.---As the Jury have only given a verdict for 15 l. this comes within the rule which the Courts have long established, that they will not grant a new trial, unless it can be done without compelling the party applying for it to pay the costs. It is clear that in this case there was no misdirection at the trial: but that is not the only case in which the Court will award a new trial *without costs*. For if the verdict be manifestly against the justice of the case, and the Judge's direction, it is fit that a new trial should be granted without costs: and this verdict is of that description. Here it appears that the plaintiff has been privy to a gross fraud on Welch in this transaction; and then the rule applies, *ex dolo malo non oritur actio*. The plaintiff wished to get 100 l. for the goods, which sum the defendant could not advance; but the scheme was that the goods should be apparently sold to Welch for 70 l. and that the defendant should pay the rest under a private agreement unknown to Welch: now that was a gross fraud on him, in order to induce him to advance his money; and as this fraud was practised by the plaintiff, he cannot recover.

BY THE COURT,

Rule absolute, without costs.

WRIGHT *v.* REED.

By the Annuity Act, 17 Geo. III. cap. 26, it is enacted, that in every deed by which any annuity shall be granted, the consideration really and *bonâ fide* (which shall be in *money only*) shall be fully and truly set forth and described in words at length, or the same shall be void. In the present Case, part of the consideration was paid in *money*, and part in *Bank Notes*, but the deed named the whole as being paid in *money*.

Upon

Upon an application to the Court that this deed ſhould be cancelled, the conſideration not being truly deſcribed; the queſtion aroſe whether Bank Notes were money in a legal ſenſe.

LORD KENYON, C. J.---Bank Notes are conſidered as money to many purpoſes. They were ſo held by the Court in the Caſe of *Miller* v. *Race* (1 Burroughs, 452).

ASHHURST, J.—The Annuity Act was paſſed for the purpoſe of guarding againſt fictitious conſiderations: but it cannot be contended that the payment in this caſe is within the miſchief which that ſtatute intended to remedy. Bank Notes are money to all intents, and in this inſtance were taken as ſuch.

BULLER, J.---This Court has never yet determined that a tender of Bank Notes is, *at all events*, a good tender: but if they have been offered, and no objection has been made *on that account*, this Court has conſidered it to be a good tender; and very properly ſo, for Bank Notes paſs in the world as caſh. In a caſe on the other ſide of the Hall, the Lord Chancellor once ſuggeſted a doubt whether theſe kind of notes were money; but here we have always been inclined to conſider them as ſuch, though the queſtion has never yet been directly determined.

Per Curiam, Rule diſcharged.

YEARDLEY v. ROE.

This was an application to change the venue from Shropſhire to Middleſex, upon the ſcore of privilege, the defendant being an Attorney.

The Court ſaid, that it was fully ſettled in the Caſe of *Pope* v. *Redfearne*, (4 Burroughs, 2027) that when an Attorney is *defendant*, he has no privilege to change the venue to Middleſex, but only when he is plaintiff.

Rule diſcharged with Coſts.

REX



REX v. SMITH.

The defendant was duly elected Mayor of Nottingham, but not having taken the Sacrament in the year before his election, according to the Corporation Act, 13 Ch. II. ſt. 2. cap. 1. an information in the nature of a *quo warranto* was applied for againſt him.

LORD KENYON, C. J. ſaid, The rule under which the defendant attempts to ſhelter himſelf from the preſent application, namely that the relators having concurred in his election, ought not to be ſuffered now to impeach it, holds very properly in caſes where the relators concur in the election of the defendant, knowing of a defect in the form of conducting it: but this is a different caſe; here the defect is a latent one, ariſing from the omiſſion of an act, which the Legiſlature have poſitively required to be done before any perſon is elected into a corporate office.

Per Curiam, Rule abſolute.

RAWLINSON v. SHAW, *Executor of* WOODHOUSE.

Woodhouſe, being indebted to the plaintiff in a ſum of money, which was the ſubject of this action, appointed him one of his executors, but he never proved the will, or acted in any way whatever as executor; but having brought his action againſt the acting executor for his debt, it was argued in demurrer, that not having actually *renounced* the executorſhip, his *legal* remedy was ſuſpended.

LORD KENYON, C. J.—It Is impoſſible to entertain the leaſt doubt in this caſe. The argument is, that if *A.* owe *B.* a ſum of money, and chuſe to make him his executor, though *B.* will not act, his legal remedy is extinguiſhed. The propoſition is too monſtrous to admit of any argument. If indeed the creditor had accepted of the executorſhip, and acted, there might perhaps have been ſomething in it. But the facts diſcloſed by the replication, poſitively negative that; for it is there averred that he never proved the will, nor took upon himſelf the burthen of the execution thereof, nor in any manner whatſoever accepted of the ſuppoſed appointment to be an executor, nor ever adminiſtered, &c. And, notwithſtanding this, he is now told that he cannot enforce the payment of his debt in a court of law. I ſhould have been

been extremely ſorry to have found myſelf bound by authorities to accede to ſuch a poſition: and I am glad that none are found to warrant it, and that there is one direct authority againſt it. There is no pretence therefore for this demurrer; and even if it could have been ſupported, it would be diſhoneſt in the extreme.

BULLER, J.—The argument in ſupport of this demurrer is fully anſwered by the plain words of the replication. The foundation of the argument is, that this is an action in reſpect of property, and that the plaintiff has poſſeſſion of that property: but the replication pointedly ſtates that he never proved the will, nor in any manner whatever acted as executor, nor adminiſtered. Then if he has not the poſſeſſion of the property of the teſtator, he ſtands in the ſame ſituation as any other ſtranger, and may equally ſue the perſon who has the legal poſſeſſion of that property.

GROSE, J—It is laid down univerſally in all the authorities on this ſubject, from the Year-books down to the preſent time, that a defendant, who is ſued as executor, cannot plead that another perſon is alſo executor with him, unleſs he aver that that other has adminiſtered. The caſe of *Swallow* v. *Emberſon*, is directly in point. The only difference is, that here the defendant ſays that the plaintiff himſelf is one of the executors, but that does not vary this caſe for the reaſons already given. I lament that the ſame practice does not obtain here that prevails in the Court of Common Pleas, where ſeveral pleas are not permitted to be pleaded without the ſpecial leave of the court. It is attended with infinitely good conſequences to the ſuitors, as it frequently prevents unneceſſary expence to the parties, in introducing improper pleas. If that were the practice here, this expence would never have been incurred.

Judgment for the plaintiffs.

REX *v. the Inhabitants of* GAMLINGAY.

This was a rule to ſhew cauſe why judgment ſhould not be arreſted in an indictment tried at the Cambridge Aſſizes, where the defendants were convicted for not repairing the highway. The indictment deſcribed the road as *leading from Hatley, towards and unto the Pariſh of Gamlingay*. The indictment afterwards ſtated that a certain *part of the ſame highway, ſituate in the Pariſh of Gamlingay, is in great decay*.

It was argued againſt the rule, that though the word *from* muſt be conſtrued excluſively, yet the word *unto* may include the



the parish; besides, if this part of the indictment was rejected, the latter part, where the parish is expressly included, will warrant the verdict.

LORD KENYON, C. J.—We are not called upon in this case to say whether or not the indictment could have been supported, if it had not described the places *to* and *from* which the road leads; but here the prosecutor has undertaken to describe the road; and the question is, whether the parish of Gamlingay are bound of common right to repair the road which is described. Now they are only so bound, if the road lies within their parish. But the road is described as leading *from Hatley unto Gamlingay*, which excludes *Gamlingay*. I remember a similar question arising on the construction of a turnpike-act some years ago, respecting the road leading through *Battle* to *Hastings*, 1 *Bur*. 376, when this Court held that the words "from" and "to" were both exclusive. And though it is to be lamented that a judgment is to be arrested on account of the insufficiency of the indictment, after a verdict has been obtained against the defendant, yet we ought not to countenance any negligence in those whose business it is to draw indictments; and if a defect in an indictment of this sort were to be overlooked, it might be expected that the same indulgence should be extended to all others. The case of *Pugh* v. *the Duke of Leeds*, which was cited, (where the words, in a lease, *from* the day of the date, was held to be *inclusive*), is not applicable to the present; for that was determined on the ground of there being no fraction of a day; and it must be remembered that though, I believe, that case was rightly decided, the contrary determination had before been made by all the judges.

ASHHURST, J.—The case of *Pugh* v. *the Duke of Leeds*. (*Cowp.* 714), was properly decided: but that turned on the construction of a contract between two persons, where their intention was to be considered. But greater certainty is required in indictments than in contracts of that kind. Now the whole of the road described by the former part of the indictment is excluded by the terms "from" and "unto;" and the latter part is a contradiction in terms to the former allegation.

GROSE, J.—of the same opinion.

Rule absolute.

CASES

Cases in the Court of Common Pleas, in Hilary Term, 30 Geo. III.

Kirkman v. Price.

This was an application to ſet aſide a bond, &c. entered into to ſecure an annuity, the conſideration not being ſpecifically ſet forth, as required by the Annuity Act, 17 Geo. III. cap. 26. The memorial, enrolled purſuant to the ſtatute, ſtated that the conſideration was 160l. paid by the plaintiff to the defendant; but the fact was, that the plaintiff had ſeveral notes of hand of the defendant's to the amount of near 100l. for money formerly advanced to him, which were given up at the time of this tranſaction, and the difference only paid in money.

The Court ſaid, the ſtatute required the conſideration to be *fully and truly* ſet forth and deſcribed, and therefore made the

Rule abſolute for cancelling the ſecurities.

Compton v. Collinson.

This was a reference from the Court of Chancery for the opinion of this Court, on the following

C A S E.

Michael Collinſon, ten years after his marriage with Jane Banaſtre, entered into articles of ſeparation, (to which her father was alſo a party) and covenanted that ſhe ſhould enjoy all eſtates, both real and perſonal, that ſhould come to her during her coverture, and that he would join in the neceſſary covenants to limit them to ſuch uſes as ſhe ſhould appoint.

Some years afterwards her father died, and certain copyhold lands deſcended to her, and the huſband again entered into like articles that he would join in ſurrendering the ſame to ſuch uſes as ſhe ſhould appoint. Soon afterward ſhe was admitted to the copyholds, and ſurrendered them to the uſes of her will; ſhe afterwards made a will, giving theſe copyholds to John Willis and his heirs; and, a few days after,



after, July 15, 1772, made an abſolute ſurrender of them to him and his heirs, and John Willis was, at the ſame time, admitted thereto. Michael Collinſon the huſband, *did not* join or concur in any of theſe ſurrenders made by his wife.

Jane Collinſon ſoon after died, her huſband ſurviving, and her ſon C. S. Collinſon being her heir at law, and her heir by the cuſtom of theſe manors.

The queſtion referred to the Court was, whether *John Willis* took any and what eſtate under the ſurrenders or will?

LORD LOUGHBOROUGH delivered the judgment of the Court.—The queſtion in this caſe is, whether John Willis took any, and what eſtate under the ſurrenders, will, and codicil of Jane Collinſon, or under either, and which of them? The ſubject of diſpute being copyhold lands, it is evident that unleſs the ſurrenders be valid, no eſtate can paſs at law. No ſpecial cuſtom is ſtated, and therefore the ſurrenders muſt be judged of by the general law of copyhold eſtates. The ſeveral ſurrenders on the face of them, are the ſurrenders of Jane Collinſon as a feme ſole: for it is not ſtated that ſhe was privately examined, nor is any notice taken of her being a feme covert, nor is there any aſſent, or evidence of aſſent, on the part of the huſband accompanying the ſurrenders. She is ſtated by the caſe, to have been in truth the wife of Michael Collinſon, ſeparated from him, firſt, by articles renouncing all his right to whatever eſtates, real or perſonal, might come to her during the coverture; and ſecondly, by deed after the copyhold eſtates had deſcended to her, covenanting that ſhe ſhould enjoy the ſame to her own uſe; and that he would join in making a ſurrender of ſuch eſtates, and in limiting them to ſuch uſes as ſhe ſhould appoint. By force of theſe articles, and of this deed, all the right of the huſband is barred. The queſtion therefore is, whether the ſurrenders of Jane Collinſon, her huſband not having joined, ſhall bar her heir? There are two diſtinct ſurrenders of each copyhold: the firſt made May 26 and June 3, 1771, to the uſe of her will; the ſecond July 14 and 15, 1772, abſolute ſurrenders to John Willis, on which he was admitted, and which he on the ſame day ſurrendered to the uſe of *his* will. If Jane Collinſon had a full power to make a valid ſurrender, the laſt ſurrenders have paſſed all her eſtate at law to her ſurrenderee. Theſe ſurrenders took effect immediately, ſhe could not herſelf have avoided them, nor could the huſband againſt his own covenant. If ſhe had ſued jointly with her huſband

band to avoid them, it would have been incongruous to have alledged as a defect in the ſurrender, the omiſſion of that which the huſband had covenanted to do, and which it was in her power to procure; and if ſhe had ſued as a feme ſole againſt her own ſurrender, it would have been ſtill more prepoſterous. If therefore Jane Collinſon could not have avoided theſe ſurrenders, it is difficult to conceive how her heir ſhould be in a better condition with reſpect to an abſolute ſurrender binding upon her, whatever claim he might have againſt a ſurrender to the uſe of her will. It cannot be more neceſſary that the huſband ſhould join with his wife in the ſurrender of her copyhold, than in levying a fine of her freehold eſtates. But it has been ſettled ever ſince the caſe in the 17 Ed. III. that if a fine be levied by a feme covert without her huſband, it ſhall bind her and her heirs, if it be not avoided by the huſband; and both Rolle and Comyns ſeem to intimate, that the law would be the ſame as to a recovery. Had the preſent caſe been of a freehold eſtate conveyed by the wife by fine, without her huſband, it would clearly have bound her heirs, and the huſband being eſtopped by his deed, the eſtate of the conuſee would have been indefeaſible at law. The modes of conveying freehold and copyhold eſtates are different, but there is ſurely a fair argument from analogy, that a copyhold eſtate tranſmiſſible under the ſame circumſtances as a freehold, ſhould be governed by the ſame rules. Both are public conveyances, and, from the nature of copyholds, there is more reaſon to ſupport the ſurrender of a feme covert, where the intereſt of the huſband is not affected by it, than there is to make a fine effectual without his joining. Of a freehold eſtate the huſband is *ſeiſed* in right of his wife, of a copyhold he has a mere *poſſeſſion*. He is not admitted in her right; ſhe is the actual tenant; and when a copyhold deſcends to a married woman, the new grant of the lord is to her, and not to the huſband. In oppoſition to this reaſoning, two caſes were cited at the bar, which were ſuppoſed to have denied the application of any argument drawn from the caſe of a fine, to the validity of a ſurrender; and to have aſſerted the abſolute nullity of a ſurrender by a feme covert, without the concurrence of her huſband. The firſt of theſe caſes is *Taylor* v. *Philips*, 1 *Vez.* 229. Now all that can be inferred from that report of Lord Hardwicke's opinion is, that if the fact had been fully before him, he would have made a caſe for the opinion of a court of law upon this very queſtion, whether a ſurrender by a feme covert without her huſband's joining, but with his aſſent, was



an effectual ſurrender? But as there was ſome reaſon to ſuppoſe there might be a ſpecial cuſtom to warrant that ſurrender, he directed a trial. It is evident then, that Lord Hardwicke was of opinion, that a cuſtom for a feme covert to ſurrender without her huſband joining, might be a good cuſtom, for otherwiſe the trial would have been idle, and he would have directed at once a caſe for the opinion of the judges. This obſervation will alſo materially apply to the next caſe, which is *Stephens* v. *Tyrell* 2 *Wilſ.* 1. where, according to the report, the Court of Common Pleas held, that a cuſtom for a feme covert to ſurrender without her huſband's joining, is contrary to law, and bad. In this caſe it is ſaid, that the Chief Juſtice obſerved, that it was not ſtated whether the huſband was to conſent, though he did not join, and therefore it muſt be taken to be without his conſent. Now the natural inference from thence is, that the conſent of the huſband, though he did not join would have made the ſurrender effectual. The Chief Juſtice there cenſures an inaccuracy in 2 *Danvers' Abridgment*, 430, *pl.* 10. cited in ſupport of the cuſtom, and the remark is juſt. But when one looks into the caſes referred to in *Danvers*, it is evident that they furniſh an authority in ſupport of a ſurrender without the huſband's joining in the act of the ſurrender. The firſt is an anonymous caſe in *Moore*, 123, where a cuſtom for a married woman to deviſe her copyhold lands, with the aſſent of her huſband, was holden to be good. The next are 3 *Leon.* 81. *Godb.* 14 & 143, and 2 *Brownl.* 218, which all treat of the ſame caſe, viz. *Skipwith's* caſe. There were two parts of the cuſtom alledged in that caſe, the one that a married woman might deviſe, the other that ſhe might ſurrender in the preſence of the ſteward and ſix of the tenants. The ſtate of the caſe in *Leonard* ſhews that the will was made in favour of the huſband, in the preſence of the ſteward and ſix of the tenants, and at the next court the ſurrender to the uſe of the will, was alſo in the preſence of the ſteward and ſix of the tenants. The cuſtom ſeems to have been holden good in ſubſtance, and it is probable that it was ſo from the citation in 2 *Brownl.* 218. This is therefore an authority, that a ſurrender without the huſband's joining, though certainly in a caſe where his aſſent might be preſumed, is good. The reaſoning of the Chief Juſtice, according to *Wilſon's* report, proceeds upon a ſuppoſition, that the cuſtom ſtated excludes the huſband entirely, becauſe it does not expreſsly require his conſent, and that it would therefore enable the feme covert to diſpoſe of her eſtate againſt his conſent. But this

this is by no means a neceſſary concluſion. A ſurrender without the huſband, may be a good diſpoſition againſt all but him, and his right to avoid it is not inconſiſtent with ſuch a cuſtom. The reaſons therefore on which the cuſtom in *Wilſon* is condemned, do not appear quite ſatisfactory; and it has always appeared to me ſomewhat arbitrary, to condemn a cuſtom, becauſe it is not conformable to the general law and policy of the nation. That eſtates ſhould be holden in ſome manors, by an heireſs independent of her huſband, is not more ſingular, than in others that the eſtate ſhould veſt abſolutely in the huſband by the intermarriage, which is the caſe in ſome manors in Weſtmoreland. This caſe then goes no further than an opinion, that a ſurrender, in which the huſband neither joins nor aſſents, cannot be good; but if that opinion were well founded, it would not affect the preſent caſe. In both *Vezey* and *Wilſon*, the obſervation made on the analogy of a fine is, that it works by eſtoppel. In the caſe in *Vezey*, Lord Hardwicke is ſpeaking of the fine of a tenant in tail, where no intereſt paſſes, which, he ſays, will be good againſt the heir by eſtoppel, and the phraſe is there correctly uſed. But as to a feme covert levying a fine, where it conveys an intereſt, it ſhall bind her and her heirs, if the huſband does not enter and avoid it, becauſe, ſays Lord Coke, ſhe was *examined, and has power over the land*, 10 *Rep.* 43. *a*. The fine there paſſes the eſtate, and when it is ſaid that ſhe is eſtopped by it, the expreſſion is uſed in the ſame looſe manner, as when it is applied to any other perſon contending in oppoſition to his own deed, by which he has paſſed away the intereſt and eſtate which he would claim.

It was objected in the argument, that no cuſtom is ſtated in the caſe, and that a ſurrender by a feme covert, even with the huſband's joining, can in no caſe be good but by the particular cuſtom of a manor. No authority was cited for this poſition, but it was argued that from the ſeveral caſes, viz. *Dyer* 363, *b*. *Cro. Eliz.* 717, and *Litt. Rep.* 274, (in which the validity of a cuſtom for a feme covert being ſeparately examined, and her huſband joining, to make a ſurrender, is affirmed), it was ſtrongly implied that ſuch a ſurrender would not be good by the general law of copyholds. This objection reſts on a ſuppoſed defect in the ſtatement of the caſe. But the Court will intend that the ſurrender by the wife ſeparately examined with the hu nd joining, would have been good. The caſe could not otherwiſe have been made, and even if the argument had been upon a ſpecial verdict, the objection would not prevail. For



it would be contrary both to law and reaſon, that the copyhold of a woman ſhould become unalienable by her marriage, and it is againſt the nature of copyhold eſtates, that they ſhould not be ſurrendered back to the lord, by the act of all the perſons having any intereſt in them, and having a diſpoſing power.

Lord Coke ſays, "This is the general cuſtom of the realm, that every copyholder may ſurrender in court, and need not to alledge any cuſtom therefore," *Co. Litt.* 59. *a.* and in *Combe's* caſe, 9 *Rep.* 75, it is holden to be a neceſſary conſequence of this, that every copyholder may ſurrender by attorney, as a thing incident by the common law; and in the pleadings of that very caſe, a ſurrender by a feme covert and her huſband is pleaded, without any cuſtom being alledged. *Co. Entries* 576. The caſes which are ſaid to afford a negative implicatiou, that without a cuſtom, the ſurrender by a huſband and wife of the copyhold of the wife would not be good, cannot be ſo conſtrued. The caſe in *Dyer*, 363, *b.* aroſe upon a queſtion whether a cuſtom in the will of *Denbigh*, that a feme covert with her huſband, by ſurrender and examination in court might alien her land, was taken away by the ſtatute of *Wales*, 27 *Hen.* VIII. cap. 26, and the opinion of *Dyer & Wray* was, that ſuch cuſtom was not abrogated, becauſe it was reaſonable and agreeable to the cuſtom of England, for the aſſurance of purchaſers. The caſe in *Cro. Eliz.* 717, ſtates a queſtion, whether the examination of a feme covert out of court by two tenants be good, without a ſpecial cuſtom; and it is holden that it is not, becauſe it is a judicial act more proper to be done in court; admitting, at the ſame time, that a ſurrender on a ſole examination in court would bind her by the cuſtom, *i. e.* by the *general* cuſtom; for though the ſtate of the facts does not appear by the report, it is fairly to be collected, that no ſpecial cuſtom for a feme covert to ſurrender in court, was given in evidence. The ſhort note in *Litt. Rep.* 274, ſeems more to favour the argument, than the two preceding caſes, which, attentively conſidered, rather make againſt it. But it may eaſily be diſcovered, why in the caſe in *Littleton*, the defendant choſe to alledge a cuſtom, rather than to rely on the general law. He makes uſe of terms much more extenſive than the general law. He pleads a cuſtom that *quælibet fœmina viro co-operta*, (*including infants*) may ſurrender; the plaintiff replies that every woman of full age may ſurrender without traverſing the cuſtom that *quælibet fœmina*, &c. and the court holds the replication bad, for he ought to have traverſed the cuſtom alledged by the

the defendant. It might be a queſtion, whether by ſpecial cuſtom, a feme covert infant could not ſurrender, though it is contrary to the general law, and therefore it is pleaded that *every* feme covert may ſurrender: but ſuch a caſe affords no inference that it was neceſſary to alledge a cuſtom for the general poſition, that a feme covert with her huſband, might ſurrender.

For theſe reaſons, this objection ought not to prevail even ſo far as to induce the Court to deſire a fuller ſtate of the caſe; which would be the only effect it could have; for the cuſtoms of moſt manors being conſonant to this general law, there is little doubt but ſuch a cuſtom might be truly ſtated in any caſe, where it were neceſſary that it ſhould be particularly alledged.

The general objection to the validity of the ſurrenders, viz. that by the common law, a feme covert is incapable of diſpoſing of her lands without the concurrence of her huſband, has been in part already conſidered; but it may be fit to examine this poſition more particularly. It certainly is, generally ſpeaking, a true one, though perhaps not quite correctly expreſſed; for a feme covert has no power to convey with her huſband, except by fine or recovery. It would be more accurate to ſtate the law to be, that a married woman can make no conveyance of her lands, except by fine or recovery; and that a fine levied by her alone, is avoidable only by her huſband. It is equally a general rule of law, that a feme covert cannnot ſue or be ſued without her huſband, and that ſhe can make no contract to bind herſelf. Theſe rules are eſtabliſhed on the principle (partly religious, and partly political,) that ſhe has entered into an indiſſoluble engagement, by which ſhe is placed under the power and protection of her huſband, given up to him all perſonal property in her actual poſſeſſion, and the right to receive all ſuch as may be reduced into poſſeſſion. To theſe general rules, there have been, in the proceſs of the law, various exceptions allowed, where the principle of the rules could not be applied to the circumſtances of the caſe. In the caſe mentioned in *Co. Litt.* 132, *b.* and ſtated at large in *Ryley Plac. Parliam.* 19 *Ed.* I. p. 66, the huſband having abjured the realm for felony, the wife was permitted to ſue and had judgment to recover ſeiſin of an eſtate, of which ſhe was jointly enfeoffed with her huſband for life, againſt the lord, who after ſatisfaction made to the king for the year, day, and waſte, claimed to have the land by eſcheat. In the 31 *Ed.* I. it was holden, that the wife of one who had abjured the realm, could make a feoffment by deed, with warranty



warranty of her land, and ſhould be bound by it. *Fitz. Abr. cui. in vitâ pl.* 31. In the 10 *Ed.* III. a *quare impedit* was brought for the King againſt the Lady Maltravers; ſhe pleaded coverture, and upon the replication for the King, that her huſband was exiled for a certain cauſe, ſhe was ruled to anſwer. In the 1 *Hen.* IV. the ſame point was determined in the caſe of the Lady *Bellknap*, whoſe plea of coverture was over-ruled on a replication, that her huſband was exiled: and in the following year, 2d of *Hen.* IV. the ſame lady ſued in her own name, and her ſuit was allowed. Lord *Coke* does not take notice of a circumſtance mentioned in the Year Book, and in *Brooke's Abridgment*, that ſome of the juſtices ſaid, ſhe ſued as farmer of the king; which ſeems to ſtrengthen the authority, for it ſhews that during the exile of the huſband, ſhe acted as a feme ſole, holding an intereſt under a grant from the king, by which ſhe might both ſue and be ſued alone.

A feme covert may convey in execution of a power, Sir *W. Jones*, 137, and *Latch* 39, and 134, and though in that caſe, there is much debate in the Court, and a difference in opinion, whether the wife had any eſtate, and whether ſhe could convey in execution of a truſt, without her huſband, yet all agreed that her feoffment without her huſband, was a valid act. A feme may execute a power to ſell lands without her huſband, and may ſell them to him. *Co. Litt.* 112, *a.* A feme covert may act in *auter droit* as an executrix, without her huſband; and it is ſaid, that ſhe may adminiſter, or prove the will, notwithſtanding his refuſal. *Com. Dig. Adminiſtration* (D). In the three inſtances laſt-mentioned, the law ſupports the act of the wife alone, becauſe the huſband has no intereſt in the execution of it; and, in all the former inſtances, ſhe is enabled to act by herſelf, becauſe ſhe cannot have the authority of her huſband, whoſe exile or abjuration, though it does not diſſolve the marriage, ſuſpends the marital power.

Caſes of ſeparation, and in conſequence of the relinquiſhment of the marital rights by the agreement of the huſband, were not likely to have often occurred in the ſimplicity of ancient times. But there is a caſe in the Year-book 47th of *Ed.* III. cap. 18, which ſhews that they were not then totally unknown in the law. "An action of account was brought againſt one as bailiff of the plaintiff's land, to which the defendant pleaded, that there was a debate between the plaintiff and his wife, on which, by the accord of their friends, the plaintiff aſſigned to his wife, for her maintenance, the land of which the account was demanded, and

and that the wife leaſed theſe lands to him for a term of years. The plaintiff inſiſts, this is no plea, and amounts merely to a denial of the defendant being bailiff; but the Court held, that he muſt anſwer the plea. And then the plaintiff traverſes the leaſe alledged to be made by his wife." This caſe ſeems to prove, that a feme covert might diſpoſe of the profits of lands allotted for her maintenance, and make a leaſe of them, without the huſband joining in the leaſe. In *Croke Charles* there are two caſes, on bonds given to ſecure the diſpoſal of a ſum of money by a married woman. The firſt of them was in the 5 *Car.* I. *Cro. Car.* 219. It was an action upon a bond given by a man after marriage, conditioned to permit his wife to make a will, and diſpoſe of a ſum not exceeding 50l. in legacies: the defendant pleaded that the wife did not make any will, and on that plea iſſue was joined. It was found ſpecifically, that ſhe did make a will, and diſpoſed of divers legacies not exceeding 50l. but that ſhe was covert at the time of making the will. Judgment was given for the plaintiff; for though by law a feme covert could not make a will without her huſband's aſſent, yet it was a will within the meaning of the condition. The other caſe was in the 10 *Car.* I. *Cro. Car.* 376. It was an action on a bond conditioned to pay 300l. after the death of the wife by the huſband, in caſe he ſurvived, for ſuch uſes as ſhe ſhould appoint by any writing under her hand and ſeal, in the preſence of two witneſſes. The defendant pleaded that ſhe did not appoint. The plaintiff replied, that ſhe by her will in writing, ſealed and publiſhed in the preſence of two witneſſes, did will and appoint ſuch ſums to be paid; to which the defendant demurred, and judgment was given for the plaintiff. The argument ſeems to have been upon the pleading this writing as a will, and not as an appointment. But the Court held it to be ſufficient, for though it was not properly a will, being made by a feme covert, yet it was a writing in the nature of a will.

Courts of law then had at this period recognized the power of a married woman authoriſed by her huſband, to make in effect a teſtamentary diſpoſition of perſonal property.

The caſe of *Manby* v. *Scott*, 1 *Lev.* 5. decided ſoon after the Reſtoration on an action which had been commenced during the Uſurpation of Cromwell, gave riſe to a very large diſcuſſion of the rights of huſbands and wives. It ſeemed then to be the opinion of the majority of the Judges, that the huſband could not be ſued for any debt contracted by

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the wife without evidence of his aſſent; conſequently for no debt contracted by her when wilfully ſeparated from him. Hale held the rule ſo ſtrict, that in a caſe reported, 2 *Levinz*, 16, ſome years after the judgment in *Manby* v. *Scott*, he non-ſuited the plaintiff, in an action brought by a gaoler againſt a huſband for the diet and lodging of his wife. It appeared in the caſe, that the huſband had left his wife in the country, and come up to London, where he married another woman. The former wife cauſed him to be indicted; and coming to London to proſecute, was, by his contrivance, arreſted, and ſent to gaol. The huſband was convicted on the proſecution. Yet Hale would not allow this peculiar caſe of the huſband's procuring the arreſt, to be an exception to the rule, which required his aſſent to the debt. Subſequent caſes however relaxed the extreme rigour of this rule, as where the huſband turns the wife out of doors, he gives her credit wherever ſhe goes, according to Holt's opinion, *Salk.* 118. But ſtill in the caſe of a wilful ſeparation of the wife, the law was underſtood to be, that the husband was not liable to be ſued for her debts. It ſeems very certain, that the Judges who argued the caſe of *Manby* v. *Scott*, did not conceive that an action could be brought againſt the wife. It was equally the ſuppoſition of thoſe who maintained that the huſband was not chargeable, as of thoſe who held the contrary, that the wife was incapable of having any property, could acquire no credit on her own account, and muſt either ſubſiſt on charity, or ſtarve, unleſs ſhe could obtain an alimony from Chancery or the Eccleſiaſtical Court. On the one ſide, this ſituation of the wife ſeparated from her husband, is argued as a ſtrong argument to ſupport the concluſion that the husband is liable to an action for neceſſaries; while they who argue on the other ſide contend, that the diſtreſs in which the wife is placed, is a juſt and expedient conſequence of her ſeparation from her huſband, from which the law ought not to relieve her. It does not ſeem to have occurred to any of the Judges at that time, that a wife ſeparated from her huſband may, in fact, poſſeſs property, that ſhe will obtain credit by means of her apparent property, and that the conſequence of her debts not being recoverable either againſt her or her huſband, would only be prejudicial to the unwary but honeſt tradeſman.

The firſt caſe which appears, after this determination of *Manby* v. *Scott*, of an action brought againſt a married woman, is that of the *Ducheſs of Mazarine*, 1 *Salk.* 116. Lord *Raym.* 147, *Comb.* 402, in which the Court avoid the queſtion,

tion, though ſhe was holden liable to the action. The Reports ſay, it may be intended ſhe was divorced, or her huſband an alien enemy; and perhaps it may be like the Lady *Bellknap's* caſe, whoſe huſband was exiled. The only notes of the caſe are very ſhort, and the point appears to have been made upon a motion for a new trial, in which the Court felt what the juſtice of the caſe required, and were not preſſed to explain the grounds of their opinion. It would however have been a ſtrange ſituation, if the Ducheſs of Mazarine, a woman enjoying a conſiderable fortune of her own, and for many years a large penſion from the Crown of England, had been protected from every legal demand, by a rule of the law of England, that no action could be brought againſt her, becauſe ſhe had a huſband whoſe perſon and fortune were utterly unknown, and could not be attached by any one with whom ſhe dealt. The only two grounds hinted at for the deciſion, could not have ſtood examination. She neither was nor could be divorced, the law of France not permitting a divorce; and though in the term when the motion for a new trial was denied, the treaty of peace had not been ſigned, and a Frenchman was then an alien enemy, yet that argument would not have been applicable in the next term. The queſtion whether a married woman, ſeparated from her huſband, and enjoying, by his agreement, a ſeparate proviſion, ſhall be liable for her debts, has come before the Courts in ſeveral caſes. In that of *Ringſtead* v. Lady *Lanesborough*, *Hil.* 23 *Geo.* III. the point was directly brought before the Court of King's Bench upon the record, and judgment given that ſhe was liable. In that caſe the huſband was ſtated to be out of England. But in *Hil.* 24 *Geo.* III. the ſame queſtion was brought before the Court, the huſband being in England, and the ſame judgment given. In *Mich.* 26 *Geo.* III. the ſame queſtion was again ſtated upon the record, in the caſe of *Corbet* v. *Poelnitz*, with this difference only, that in that caſe the contract was for money, in the others, for goods; and the judgment was the ſame. About the ſame period, *Eaſt.* 16 *Geo.* III. the queſtion was agitated in this Court, firſt, in the caſe of *Hatchett* v. *Baddeley*, 2 *Blackſt.* 1079, where the Chief Juſtice and my brother *Gould* took a diſtinction on the pleadings, which neither ſtated a ſeparation, nor a ſeparate maintenance, but that the wife had eloped and lived ſeparately from her huſband; which diſtinction has certainly great weight. But the other two Judges held that the action would not lie, merely on the ground of the defendant being a married woman. In *Eaſt* 18 *Geo.* III. the queſtion was again ſubmitted to this Court,



Court, in the caſe of *Lean* v. *Schultz*, 2 *Bl.* 1195, on pleadings, which diſtinctly ſtated a ſeparation and ſeparate maintenance; but the queſtion itſelf then received no determination, the Court having given judgment merely on a point of form, namely, that the huſband ought to have been joined for conformity.

From this ſtate of the deciſions, it cannot be concluded, that it is a ſettled point, that an action may be maintained againſt a married woman ſeparated from her huſband by conſent, and enjoying a ſeparate maintenance. But ſuppoſing the law to be according to the three laſt determinations of the Court of King's Bench, it ſeems to be a neceſſary concluſion, that a married woman, whoſe ſeparate property conſiſts of a copyhold eſtate, ſhould have a power to ſurrender it, for otherwiſe the law would compel her to pay, without allowing her to uſe the means of paying, and enable the creditor to recover a demand, without the power of making that demand effectual. This is certainly an argument from inconvenience alone, and therefore not altogether concluſive; but it has great weight when no poſſible inconvenience can be oppoſed on the other ſide. The intereſt of the huſband is entirely out of the queſtion; the intereſt of the lord is not hurt by the ſurrender; the expectancy of the heir is not an intereſt, and, ſlight as it is, cannot be ſet up as a claim in juſtice, to take the eſtate without paying the debts.

But the main and ſubſtantial ground of the caſe is, that the wife is the tenant of the copyhold, and not the huſband; that the eſtate can be forfeited or ſurrendered only by her acts, not by his; that the authority which he acquires by his marital rights to direct and controul her acts, is by his covenant, in the preſent inſtance, annulled, or at leaſt ſuſpended; and there is then no impediment to the validity of an act, paſſed in the court of the manor, between her and the lord.

"We are therefore of opinion, that John Willis took an "eſtate to him and his heirs, according to the ſeveral cuſtoms "of the manors of Banſtead and Ryegate, under the ſurren-"ders and admittances of the 15th of July, 1772."

Loughborough.
H. Gould.
J. Wilſon.

ROUSE

ROUSE *v.* BARDIN.

This was an action of treſpaſs to try a right of way over Brompton-Heath, in Middleſex. The defendant's juſtification ſtated, that there had been, from the time whereof the memory of man is not to the contrary, a common foot-way from the highway leading from Knightſbridge to Earl's-Court, through the cloſe called Brompton-Heath unto the Highway leading from London to Fulham. But it appearing upon the evidence that the foot-way in queſtion over Brompton-Heath, led into another foot-way called Church-Lane, before it reached the road from London to Fulham, Lord Loughborough, who tried the cauſe, directed a verdict for the plaintiff, on account of this variance in the *terminus ad quem*.

Now upon a motion for a new trial, the Court gave judgment.

GOULD, J.—This caſe ariſes on pleadings of conſiderable length, ſtating that the treſpaſs was committed in a place called Brompton-Heath, with ſeveral variations in point of deſcription. The defendants ſay, that from time whereof the memory of man is not to the contrary, there has been a common public highway, for all the liege ſubjects of this kingdom, to paſs and repaſs on foot, from a certain other common public highway leading from Knightſbridge to Earl's Court, in, through, over, and upon the ſaid cloſe called Brompton-Heath, unto a certain other common highway leading from London to Fulham, and back again, in, through, and over the *locus in quo*. I underſtand, that at the end of this cloſe leading towards the Fulham road, that is, in the line of the way, you do not immediately iſſue into what is called the Fulham road, but into another common highway, called the Church-Lane, and from thence over a very ſhort ſpace, you enter into that which is properly called the Fulham road. Now my apprehenſion always has been, that in caſes of this ſort, the intermediate ſpaces, either before the entrance into a field, or at the exit out of it before you reach the *terminus ad quem*, are immaterial. This is the caſe of a common public highway, and there have been very conſiderable doubts, whether in a common highway, any *termini* at all need be ſet forth. There was a caſe mentioned at the bar, of an indictment for ſtopping a highway at Kenſington, in which it was holden, that the way was ſufficiently deſcribed, without ſtating



ſtating from what place, to what place it led; and among other things, a reaſon was given for that opinion, becauſe a highway runs from the ſea acroſs the whole iſland. But nevertheleſs, if a defendant will ſtate the *termini* in his juſtification, he is bound to prove them. There are many inſtances, which muſt occur to every one, where things are not neceſſary to be alledged in pleading, yet if they be alledged, they muſt be proved. Such as the deſcription of a public act of Parliament; the day when the ſeſſions were holden; and the like. So where an officer juſtifies under proceſs of execution out of a court, it is unneceſſary for him to ſtate a judgment, yet if he will ſtate it, he is bound to prove it as deſcribed. Theſe are common caſes, and many more might be adduced. The queſtion then in the preſent caſe is, what the terms of this plea require to be proved, and whether they neceſſarily import that the way in diſpute was *adjoining* to the Fulham road? Now that is not the caſe; the way is deſcribed to go, *in*, *through*, *over*, and *along* Brompton-Heath, *unto* the Fulham road. But there is an intervening ſpace between that and the Fulham road. If it had been deſcribed to be *adjoining* to the Fulham road, I have already given my opinion as to the proof. But it is ſtated to lead *unto* the Fulham road; which in my apprehenſion, is nothing more than this; a common highway which is one entire thing, leads over this field to the Fulham road; and ſo it does, notwithſtanding there is an intervening piece of ground. The caſe cited at the bar from *Ventris*, comprehends this idea. It is there ſaid to be ſufficient to ſtate the places from which, and to which the way leads, though the meſne paſſages ſhould be miſtaken. It will be material to advert to ancient pleadings in juſtification. I find in *Raſtal's Entries*, 617, *b*. a right of way pleaded as follows: a man was ſeiſed of a meſſuage in *S*. and preſcribed for a way for all thoſe whoſe eſtate, &c. both for horſe and foot "*from the meſſuage to the pariſh church of E. and the market town of M.* with all his carriages *ultrà clauſum prædictum*." Now it would be productive of infinite uncertainty, to require an exact deſcription of the line of the way, to ſay that it went ſo many yards to the North, then turned to the Weſt, and then to the Eaſt, in that irregular manner. Such juſtifications as theſe would then be clogged with inſuperable difficulties in point of proof. And I think it would be totally unneceſſary; the uſage defines the way. I mention this as occurring to me from the books and pleadings; and with regard to experience, I have always underſtood that the intermediate ſpaces are diſregarded, both

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as to the approach to a field and the quitting it. It is ſufficient to anſwer the treſpaſs, and juſtify under a right to paſs over the cloſe. I therefore think this is not a material variance from the plea.

WILSON, J.—I am of the ſame opinion. Where the way is a public highway, it is in no ſort neceſſary to ſtate either the *terminus à quo*, or the *terminus ad quem*; where it is a private way, it is neceſſary to ſtate them, becauſe private ways are given for particular purpoſes. But it is different with regard to a public highway, becauſe all his Majeſty's ſubjects have a right to uſe that way, for all purpoſes, and at all times. The reaſon given in the ancient caſes, why a highway muſt be particularly deſcribed, is not a very good one, namely, that it muſt be ſtated to lead to a market town, in order to ſhew that it is a highway. Lord *Hale* ſays, whether it be a highway or not, depends much on reputation. I am therefore of opinion, that in juſtifying a treſpaſs, becauſe the place in queſtion is a highway, it is not neceſſary to ſtate the places to which, and from which it leads. If that be ſo, the next queſtion is, whether thoſe places being ſtated in the plea, they are ſufficiently proved? With reſpect to that, the way in diſpute is ſtated to be a highway leading from one highway to another highway. I think it cannot be doubted, but that this is a ſufficient deſcription. But it is impoſſible to ſtate the ſpecific line of the road under that deſcription, which can only be, that it leads from one point to another. What the line is on which the highway paſſes, muſt be a matter of evidence. The objection in this caſe is, that the way is ſtated to lead to the Fulham road, but that before it reaches the Fulham road, it goes for a little ſpace on another highway. But I do not conceive that to be a material variance. I underſtand the allegation to import no more than this, namely, that there is a highway over the cloſe, on which you may go from the Fulham road to the Kenſington road; but not that the Fulham road joins to the cloſe over which the highway leads. But even if that were the import of the allegation, I ſhould have conſiderable doubts whether this were a variance. But clearly the allegation means no more than this; there is a highway over the cloſe, leading from the Fulham road to the Kenſington road, which I think was ſufficiently proved by the evidence.

LORD LOUGHBOROUGH.—My brother *Heath* has informed me, that he is of the ſame opinion with my brothers *Gould* and *Wilſon*. I therefore certainly feel that the authority of the Court ought to govern my opinion. But on the beſt conſideration I have given the queſtion, I have not been

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able to bring myſelf to agree with them. I ſtill retain the opinion I firſt had at the trial, and think, that in all caſes, where a real difference in opinion exiſts, it is right to avow it, and ſtate the grounds on which we differ. What weighs with me in the preſent caſe, is the poſitive authority of 2 *Rolle's Abridgment*, 81, in which it is ſaid, that in an indictment for an obſtruction, or nuiſance, near a highway, it is neceſſary to ſet out the *terminus à quo*, and the *terminus ad quem*; a caſe in 15 *Car.* I. is referred to where an indictment was quaſhed for this reaſon, which was ſaid to be a common exception, and divers indictments had been quaſhed on the ſame account. Againſt that authority, a caſe in *Latch*, 123, and ſome ſubſequent caſes were cited. But that caſe, in my apprehenſion, tends rather to confirm than weaken the authority of *Rolle's Abridgment*, for it ſhews that a much nicer objection was allowed by all the Court. It was ſtated in the indictment, that at Kenſington the defendant obſtructed the King's highway from London to Kenſington, and the Court two ſeveral times held this to be bad, becauſe they ſaid, the manner of deſcribing the way excluded Kenſington. The indictment was then drawn in a third form, and the way deſcribed to be, the King's highway in Kenſington; this was holden to be ſufficient, firſt by Jones, and afterwards by Dodderidge and Whitlock, and the reaſon given is, becauſe a highway leads from the ſea through all England. But that reaſon I do not conceive to be a fair one: the obvious reaſon is, that a highway ſtated to be in a town is ſufficiently certain. And in that caſe, Jones diſtinguiſhes a common way, in which the *termini* muſt be ſet out, from *alta via regia*. The caſe in 3 *Keble* 89, is not applicable to the preſent; it was of a preſentment on a view by a jury, on an annoyance in a cloth fair, which the Court, after verdict, held good. I think the caſe in *Andrews*, 137, before Lord Chief Juſtice *Lee*, was rightly determined on its own grounds. One queſtion there was, whether the deſcription of the river Thames at Fulham, was ſufficient, without ſtating the places to which and from which it flowed. But it would be abſurd to require abuttals of navigable rivers, in that caſe it was holden ſufficient to ſay the river Thames at Fulham; and both Probyn and Chapple ſay, it was not neceſſary to ſet out the *termini*, for the Court would take notice of the river Thames. But admitting that in an indictment for a nuiſance in not repairing, it was ſufficient to ſtate a highway generally, yet it ſeems to me that the ſame rule is not to be applied to a plea in bar of an action of treſpaſs; becauſe every man has *primâ facie* a right

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to exclude all others from coming over his land, and the juſtification muſt be ſet out with due certainty, and notice to the plaintiff of the way claimed over his ſoil. There may be many ways claimed, and the occupier of the field ought to know which is inſiſted upon; he may admit one, and deny the other; he has a right to reply *extrà viam*, which he cannot do, unleſs the way is explained with defining the term where it commences and ends. In the caſe before the Court, the plaintiff might have admitted the road to the Church-lane; he is deceived by the plea, for he knows there is no road over his field which directly terminates in the Fulham road. But whether the defendant was or was not obliged to deſcribe the way ſo particularly, he has undertaken to do it, and has not done it truly; a way terminating in the Church-lane, and a way terminating in the Fulham road, are not only diſtinct, but it is phyſically impoſſible they can be the ſame. If the road were a line drawn from the Knightſbridge to the Fulham road, the line actually taken into the Church-lane, muſt of neceſſity be *extrá viam*, and ſo *vice verſâ*. To ſtate generally a right to croſs a field without any given direction, ſeems to me ſo uncertain, that it is impoſſible to meet it with preciſion, either in a replication, or on traverſe of the plea.

Rule abſolute for a new trial.

GUNNIS *v.* FRHART.

The defendant bought an eſtate at an auction, which, in the printed particulars of ſale, was ſtated to be free from all incumbrances; but there being a charge of 17 l. a-year on the eſtate, he refuſed to take it, and this action was brought.

Upon the trial the plaintiff was non-ſuited, Lord Loughborough refuſing to admit evidence that the auctioneer declared publicly to the company at the ſale, that the eſtate was thus incumbered, no proof being offered that the defendant had expreſs perſonal information given to himſelf of it.

And now, upon motion for a new trial, the COURT agreed in his Lordſhip's opinion.

Rule refuſed.

COLLIS,



COLLIS, *and others*, *v.* EMMETT.

This was an action againſt the drawer of a bill of exchange, brought by the indorſers; and a ſpecial verdict having been found, it now came for the conſideration of the Court.

The verdict ſtated, that John Emmett, who was partner with Liveſay, and Co. at Clithero, wrote his name upon a piece of blank paper, duly ſtamped, and gave it to Liveſay, and Co. for the purpoſe of drawing a bill of exchange, at ſuch time, for ſuch ſum, and to ſuch perſons, as they ſhould think fit.

That afterwards the ſaid Liveſay, and Co. drew on the ſaid paper, above the name of the ſaid John Emmett, *a certain writing directed to the ſaid* Liveſay, and Co. in the words and figures following, viz. "*Clithero, April 5th*, 1788, "£. 1,551, three months after date, pay to Mr George "Chapman, or order, fifteen hundred and fifty pounds, "value received as adviſed, John Emmett." That the occaſion and manner of giving the ſaid paper writing was as follows, viz. That on the ſaid 5th of April, 1788, the ſaid Liveſay, and Co. were indebted to Thomas Jeffery, in the ſum of 1,512*l.* 9*s.* upon a bill of exchange, which became due that day, and which had been previouſly given for goods ſold by Jeffery to them. That one Richard Collis, clerk to the ſaid Jeffery, on that day applied at the houſe of Liveſay, and Co. in Cheapſide, for payment of the ſaid Bill; that on ſuch application, he ſaw the ſaid Anſtie, one of the ſaid partners, who informed the ſaid Richard Collis, that he could not conveniently then pay the ſame, but requeſted the ſaid Richard Collis to take a bill on the ſaid houſe of Liveſay, and Co. for the ſaid ſum of 1,512*l.* 9*s.* at three months date, including the intereſt thereof in the mean time, and gave to him the ſaid *blank paper* above-mentioned, with the name of the ſaid John Emmett written thereon, to be filled up by one of the clerks of the ſaid Liveſay, and Co.

That one Ludlow, a clerk of the ſaid Liveſay, and Co. filled up the ſaid writing for 1,551*l.* being the amount of the ſaid bill, and intereſt, in manner and form as above ſet forth, except the acceptance and indorſement thereof as hereinafter mentioned; and that, immediately afterwards, the ſaid paper writing was carried to Andrew Goodrick, another clerk of the ſaid Liveſay, and Co. and who was authoriſed by the ſaid Liveſay, and Co. to accept the ſame, and which the ſaid Andrew Goodrick accordingly did, in the name of the ſaid Liveſay, and Co. *That with the authority of the ſaid Liveſay, and*

and Co. the name of George Chapman was then indorſed in the ſaid paper writing, and that the ſaid paper writing, ſo filled up, accepted and indorſed, was then delivered to the ſaid Richard Collis, and the ſaid Richard Collis thereupon delivered up the bill for 1,512*l.* 9*s.* to the ſaid Liveſay and Co. That the ſaid Thomas Jeffery afterwards negotiated the ſaid paper writing with the plaintiffs, and *received the full amount thereof from them*, deducting a diſcount at 4½*l. per cent.* and delivered the ſame to the ſaid Plaintiffs. That the ſame was duly preſented for payment to the ſaid Liveſay and Co. who refuſed to pay the ſame, whereof the ſaid John Emmett had due notice.--That there was no ſuch perſon as the ſaid George Chapman, the ſuppoſed payee of the ſaid paper writing, but that the ſaid George Chapman was *merely a fictitious perſon:* that Emmett gave no *further, or other authority than as aforeſaid*, and *knew nothing of this tranſaction.* That the Plaintiffs had *then no knowledge that the ſaid George Chapman was a fictitiou, perſon*, or of the circumſtances under which the ſaid paper writing was drawn, accepted, and indorſed, but that the ſaid Thomas Jeffery *had full knowledge of the whole of the ſaid tranſactions.*

LORD LOUGHBOROUGH.—We have taken the whole of this caſe into our conſideration, and the reſult of our opinion is, that the plaintiff is intitled to recover. The ſpecial count in the declaration, ſtating the whole of the tranſaction, would have afforded a ground, upon which I have thought that judgment might have been very properly pronounced in his favour. But it appears upon the record, that the caſe ſtated on the ſpecial count differs from the finding on the ſpecial verdict in two or three circumſtances; that count therefore would clearly not ſupport a judgment in favour of the plaintiff. The circumſtances are not very material, but as the count and the verdict at preſent ſtand inconſiſtent with each other, a judgment for the plaintiff on the firſt count would undoubtedly be erroneous. We muſt therefore look into the declaration, to ſee if there be any count on the record, on which the plaintiff may ſupport a judgment. And it appears to us, that it may fairly be ſupported on the ſecond count, ſtating the bill to be a bill *payable to bearer.* It is certainly not *literatim* payable to bearer, it is drawn payable to *George Chapman* or order. Upon a fact ſet forth in the ſpecial verdict, it appears that by the per-



miſſion at leaſt, if not ſomething more than the permiſſion of the defendant, a power was given to Livesey and Co. to frame bills of exchange, binding him in any manner they thought proper, within the limits of that power. There is no doubt they might, within thoſe limits, have drawn a bill in terms payable to bearer; the bill they have choſen to draw, is a bill payable to Chapman or order: and it is found on the verdict that there is no ſuch perſon as Chapman. Now the conſequence of this ſeems naturally and juſtly to be, that when a ſecurity is negociated, on which, by the terms of it, the party receiving it apprehends he has a clear right to recover, and by the inſertion of the name of a fictitious perſon, his recovery is impeded (it being impoſſible to prove the order of a perſon who has no exiſtence), it ſhould ſeem in point of law preciſely the ſame in effect, as if it had been made payable to bearer. A bill of exchange is an authority to pay purſuant to the order of the payee; and it is alſo an undertaking to pay purſuant to that order. But if there be no perſon who by an impoſſibility can give ſuch order, the engagement muſt be to pay the bill. If the order of the perſon cannot be procured, and with the knowledge and privity of the parties who make the bill, ſuch a name is put in as cannot give an order, it is in effect, and in point of law, the ſame thing as if they had made it payable to the perſon who held the bill, namely the bearer. The determination of the court of King's Bench, has approved the ſame rule and we think that a right determination.

Judgment for the plaintiff on the ſecond count

BOUCHIER v. WITTLE.

Upon an objection that there was not 15 days between the Teſte and Return upon a Capias. The court allowed the Teſte to be amended.

MEARS v. GRENAWAY

By the ſtatute 22 C. II. ſt. 2. it is enacted, that, in actions of treſpaſs, aſſault and battery, &c. where the damages are under 40s. the plaintiff ſhall recover no more coſts than damages, except *where the judge ſhall certify that the aſſault and battery was fully proved.* This was an action for aſſault and battery, ſtating, that the defendant then and there tore and deſtroyed the plaintiff's cloaths of the value of 20l. ſo that they became of no uſe. The jury gave 5s. damages, and the judge did not certify, but the prothonotary allowed full coſts to the plaintiff. This was a motion to ſhew cauſe why the prothonotary ſhould not reviſe his taxation.

LORD LOUGHBOROUGH.—There is no doubt in this caſe, that the ſame queſtion might have been left to the jury, which my brother Groſe aſked them in the caſe of *Cotterill* v. *Tolly*, namely, whether the tearing of cloaths were part of the ſame act for which they gave 5s. damages; if they had anſwered that it was ſo, there would have been no queſtion. But it is the ſame thing if it appears on the face of the declaration; which, after ſtating the beating, goes on to ſtate that the cloaths of the plaintiff were ſpoiled, and then ſpecifies each particular article, his coat, waiſtcoat, hat wig, ſhoes, ſtockings, &c. Now I can only conceive one caſe, in which, by any reaſonable probability, theſe acts can be conſidered as wholly diſtinct; and that is, by ſuppoſing that the defendant had firſt beat the plaintiff, then ſtripped him ſtark-naked, and ſpoiled his cloaths. But it is evident that one act was in conſequence of the other; and the law is not to be evaded by a device of pleading.

GOULD, J.—There are two courſes marked out for judges in caſes of this kind, one by the ſtat. 43 *Eliz.* the other by 22 & 23 *Car.* II. The firſt and beſt determination is in 3 *Keble*, but that has been open to a great deal of ſubtle reaſoning and diſtinction. Yet I think that the beſt conſtruction, which beſt anſwers the end of the legiſlature, and puts a ſtop to all frivolous actions, by reſtraining more coſts than damages from being allowed in the caſes ſpecified. If therefore the declaration ſtates the tearing of the cloaths to be done at the ſame time with the beating, the court will conſtrue it ſo as to accompliſh the object of the ſtatute, and will hold



the tearing to be part of the ſame act, and a conſequence of the battery. It was well determined in Walker's caſe in 4 *Co.* that the words *adtunc & ibidem*, united and coupled all together.

HEATH, J.—Whatever difference of conſtruction there was formerly on the ſtatute of *Car.* II. it is now ſettled, that it muſt either appear on the face of the declaration, or be found by the jury, that the tearing the cloaths was in conſequence of the beating. But after a general verdict it is to be intended that it was ſo found; and this may be without violence to the caſes determined in the King's Bench.

WILSON, J.—The plaintiff is not intitled to his full coſts. The caſes reſt on the form of the declaration. If, in an action of this kind, the party chooſe to forego the *tort* to his perſon, and only goes for the injury to his cloaths, he would have his full coſts. But if he will combine both together in one count, the caſe is within the ſtatute of *Car.* II. becauſe the principal injury is the battery; and the judge may certify.

Rule abſolute.

CLAY *v.* WILLAN.

The defendant, who was a common carrier, adverti ſed, by a printed bill, that he would be anſwerable for no *caſh, plate*, &c. above 5l. value if loſt, unleſs entered and paid for as ſuch, namely, one penny for every pound value, as inſurance.

This was an action to recover the value of a parcel of light guineas, ſent by this carrier to London, and loſt. It being proved on the trial that the perſon who delivered the parcel knew of the above conditions, and did not declare the contents, or pay for it as valuable, the plaintiff was non-ſuited.

Now, upon motion to ſet aſide this non-ſuit,

The court ſaid the parcel ought to have been entered, and paid for as valuable, according to the printed conditions, and therefore

Diſcharged the rule.

TRE-

TRELAWNEY v. THOMAS.

In the late election at Briſtol the plaintiff was employed by the defendant (who was a member of a committee for conducting Peach's election) as an agent in the intereſt of Peach and Cruger; and this was an action for labour, &c. and alſo money advanced in that ſervice.

On the trial two witneſſes, Lediard and Ewbank, were called, who having given Mr. Peach bonds of indemnity againſt the expences of the election, were rejected by Lord Loughborough as intereſted, inaſmuch as Peach might be liable to this debt, if the defendant was diſcharged of it on the ground of being his agent; and a verdict was given to the plaintiff, with intereſt for the money advanced.

It was contended, on a motion for a new trial, that no intereſt ſhould have been allowed; and alſo that the evidence above-mentioned ſhould have been admitted. Upon which the court gave the following judgment:

GOULD, J.—It would be an exceedingly hard caſe, if the plaintiff Trelawney was not intitled to recover againſt the defendant Thomas, conſidering, from the ſtate of the evidence, the active ſhare and part which he took in this buſineſs. For my own part, if I had been preſent on the ſpot, and obſerved his conduct, I ſhould have looked upon him as a perſon ſupporting the credit of Cruger, and putting himſelf forward as a ſtake to be reſponſible to every body. With reſpect to the committee, it is clear that Thomas was a member of it, and ſuppoſing the money to come from that committee, and having ſaid nothing to give the plaintiff a better right againſt any other perſon, he ſhall not be permitted to turn the plaintiff round. With reſpect to the objection to the witneſſes, I take it, that unleſs a witneſs is intereſted in the event of a cauſe, the objection will not go to repel him; it will not go to his competency, but only to his credit. In this caſe, it ſeems to me from the ſtatement of it by my lord-chief-juſtice, that there was an intereſt in theſe two witneſſes, as they were liable to that ſum of money which would follow a verdict in point of coſts: they appear therefore to me intereſted to procure a non-ſuit if they poſſibly could for the plaintiff, or a verdict againſt him. As to the laſt queſtion, relating to the intereſt on the money,



ney, I remember a caſe extremely well, where, on a writ of inquiry, the jury, on aſſeſſing damages, found intereſt for money lent; my brother Whitaker applied to ſet aſide that inquiſition, on the ground that the giving intereſt was not warranted by any precedent: a caſe was then cited from Bunbury's reports (119), in which the court were of opinion, that, for money lent, intereſt ſhould be recovered; and Whitaker's motion was refuſed. Now money laid out for the uſe of another, and money lent to him, ſeem to ſtand preciſely on the ſame ground with reſpect to reaſon, juſtice, and equity. As far therefore as intereſt was aſſeſſed with reſpect to the liquidated ſum, I think the verdict perfectly right, and ought to be ſuſtained; as to the ſum for a day's wages, certainly in my apprehenſion, no intereſt ought to be allowed; and this diſtinction is made in the caſe in Bunbury, that for goods ſold and delivered, or work and labour, no intereſt ought to be allowed; otherwiſe of money lent. But there is a known and uſual method of remitting damages of this kind. I am therefore of opinion, that there ought not to be a new trial.

HEATH, J.—I am in the ſame opinion with my brother Gould, on the firſt point. I think it clear that Thomas has made himſelf liable; he was one of the acting committee, and the only perſon the plaintiff can ſue. As to the queſtion concerning the witneſſes who were examined on the *voir dire*, one ſays he has entered into a written agreement, the other that he gave a bond for the payment of money; and one ſays the money was to be made uſe of in defraying the expences of the election. If the party were ſued on the bond, though in point of law perhaps it could not be pleaded that only ſuch a ſum was really advanced, yet in equity no more would be recovered. Then the queſtion is, Whether they are intereſted in the event of this ſuit? Now it appears clearly, that Cruger and Peach were joint candidates; it alſo appears that there was a committee formed for the intereſt of both, and that the defendant Thomas was a member of that committee. When therefore the two witneſſes were called to be examined, and to non-ſuit the plaintiff, who brings his action to recover the expences of the election, they ſpeak moſt materially in reſpect to their own intereſt; becauſe the money to be recovered by this verdict, will be part of the money, for the ſecuring payment of which, the agreement was entered into, and the bond was given.

WILSON,

WILSON, J.—With reſpect to the firſt queſtion, it is evident that the Jury might have found either way; there being evidence on both ſides, they might very well find for the plaintiff, which they have done. With reſpect to the other queſtion of the two witneſſes, I entertain very great doubts. I am not prepared to go the length of ſaying their teſtimony ought to be rejected. All that one of them ſays is, that he gave a bond to Mr. Peach, conditioned for the payment of money; and that he underſtood Peach was to apply it to defray the expences of the election. Now, it does not at all appear that Peach would be anſwerable to the defendant Thomas, becauſe, if the committee undertook the election at their own expence by their own ſubſcription, the candidate was not anſwerable to them; and if they were merely agents, they were not themſelves perſonally anſwerable. There is no evidence, therefore, that Thomas could have compelled this money from Peach; and unleſs that was clearly eſtabliſhed, I am of opinion that there is not a ſhadow of intereſt in the witneſs Ewbank. With regard to Lediard, I ſhould alſo doubt whether he had an intereſt in this caſe, which muſt be ſhewn, though they might have a common cauſe. Yet, even if the objection were to hold, it would go only to the credit of the witneſs. Now theſe perſons are not to pay over to the defendant either the damages or coſts of ſuit which he might incur; but there is a chance that Peach may call upon them. It is alſo very likely that Lediard might be miſtaken; when he was giving an account of a written engagement, he might not recollect exactly what it was, it might be a bond having ſome recitals in it, or ſomething relating to the election; but we do not know what it was. But I think it is too much to reject the evidence of witneſſes, unleſs there is a poſitive and direct proof either out of their own mouths, or by record (but out of their mouths it ſhould be), that they are intereſted in the event of the cauſe. In the preſent caſe it ought to be ſhewn, that Thomas was employed by Peach, and that Peach was liable to him, when he made himſelf liable for the money.

GOULD, J.—I remember a caſe in Strange, where the witneſs anſwered to the *voir dire*, that though he was not under any legal obligation to bear out the coſts, yet he conſidered himſelf under an obligation in point of honour, and that repelled him.

LORD LOUGHBOROUGH—In this caſe there was no evidence at all of there being any committee, who had money

of



of their own, contributing to pay towards the expence of the election; on the contrary, the evidence on the part of the defendant proved the negative of that propoſition. There was a committee managing the election for the abſent candidate, Mr. Cruger; and Mr. Peach, one of the candidates, has an engagement on the part of Mr. Ewbank to pay ſimply a ſum of money, but Ewbank declares that the conſideration on which he had given that bond, and what would make the real debt between Peach and him, was the application of ſo much of that ſum as ſhould be neceſſary towards the expences of the election, in relief of Peach, the partner of Cruger. The other witneſs, Lediard, entered into an agreement, which he ſtates to be exactly of the ſame effect, for the payment of money which he underſtood to be for the expences of the election. Now, they ſeem to me to have the moſt direct intereſt in the event of the cauſe: not that the verdict could be evidence on which the money would be demandable of them, but in the perſuaſion of their own minds, that the difference of the cauſe was juſt ſo much to them in the proportion of the coſts. It is certainly ſufficient, from the caſe in Strange, that the witneſs thinks himſelf intereſted, though in point of law there could be no recovery againſt him. Now if he diſcloſes the nature of his intereſt, and honeſtly ſays what that intereſt is, according to his own conception of it, and it is an intereſt which by immediate and neceſſary conſequence muſt ſubject him to the coſts in the action, it would be ſtrange to ſay that it was indifferent to him whether the defendant or plaintiff recovered. Certainly, in point of law, theſe witneſſes muſt pay the money due on their agreements, but it is equally certain that Peach could have execution for no more than he could ſtate to be paid by him for the expence of the election. The 44l. due to the plaintiff Trelawney is money advanced towards the expence of the election. In caſe he recovers, the obligation to pay the 44l. and all the coſts of this, and the other action attaches, which, in that reſpect, become part of the expences of the election. If the plaintiff had been non-ſuited, they might have tendered the two ſums to Peach, and thrown on him the coſts. With regard to the queſtion, how far collateral intereſt in the ſame cauſe will affect the parties, ſo as to reject their evidence, I am at a loſs for a ſettled and known rule. The caſes have differed very widely upon it; it has appeared in ſeveral caſes, that where the witneſs has ſtood preciſely in the ſituation as either party to the cauſe, with reſpect to another action, it

was

was better to hold it to be an objection that went to his competency rather than his credit. But I know that opinion is combated by very great authority. Yet it was ſo ruled in the time of Lord Chief Juſtice Parker by all the Judges of England. The caſe is in Forteſcue 246, Lock *v* Hayton, where an action was brought on a policy of inſurance, and the plaintiff having proved the policy and premium, the maſter of the ſhip was called to prove the loſs and damages, who admitted that he himſelf made an inſurance on ſome goods of his own on board; an objection was taken to his competency, which the Chief Juſtice reſerved for the conſideration of the Court: and afterwards on a communication with all the Judges it is ſtated by Forteſcue, who was himſelf a Judge at that time, to be their unanimous opinion, that it was a ſufficient objection to repel the witneſs. But this in the preſent caſe goes beſide the point, as I take it here, there was a direct intereſt in the coſts of the cauſe.

Rule diſcharged.

CROWN CASES.

The appearance of a monſter in human ſhape, who has lately gone about the ſtreets of London, and wounded ſeveral women in the moſt brutal manner, having carried the public attention to the laws againſt maiming, the following Caſes lately determined on the COVENTRY ACT, not being noticed in *Burn's Juſtice*, or the other books of that kind, cannot fail of being acceptable to our readers.

WILLIAM LEE'S CASE.

At the Old Bailey July Seſſions, 1763, William Lee was indicted on the COVENTRY ACT, 22 and 23 *Car.* II. cap. 1, before Lord Chief Baron *Parker*, preſent Mr. Juſtice *Bathurſt*, and Mr. Juſtice *Wilmot*, for that he, contriving and intending Agnes his wife to maim and diſfigure, on purpoſe and of malice aforethought, by lying in wait, did make an aſſault with a certain razor, and the neck of the ſaid Agnes did cut, &c. with intent to maim and diſfigure.

The facts were, that the priſoner returned home one night, after his wife and two children were abed and aſleep

and

and cut his wife's throat with an old razor which he had concealed in his ſtocking, making a wound about three inches in length, and quite acroſs; but providentially it was not mortal.

The words of the Act of Parliament are, "That whoever ſhall on purpoſe, and of malice aforethought, and by lying in wait, unlawfully cut out, or diſable the tongue, put out an eye, ſlit the noſe, cut off a noſe or lip, or cut off or diſable any limb or member, &c. ſhall ſuffer death without clergy:" and it was ſubmitted to the Court, that the evidence did not prove any offence within the ſtatute.

The COURT were of the ſame opinion; and the priſoner was accordingly acquitted.

BARNEY CARROLL'S CASE.

At the Old Bailey in July Seſſions, 1765, Barney Carroll was indicted before Lord Chief Baron *Parker*, on the 22 and 23 *Car.* II. cap. 1. § 7, for that "he did on purpoſe, and of malice aforethought, and by lying in wait, feloniouſly and unlawfully make an aſſault upon Cranley Thomas Kirby, Eſq. with intention to maim and diſfigure him; and with a certain knife did on purpoſe, and of his malice aforethought, and by lying in wait, unlawfully and feloniouſly *ſlit the noſe* of the ſaid Cranley Thomas Kirby, with intention in ſo doing to maim and diſfigure him. AND THAT William King, at the time of the committing of the ſaid felony, was preſent, counſelling, aiding, and abetting the ſaid Barney Carroll to commit the felony aforeſaid."

The proſecutor had apprehended a young pickpocket near Somerſet-houſe in the Strand; and upon threatening to take him before a Magiſtrate, the priſoner Carroll, who appeared to have been lurking under the ſide of the New-Church, immediately came up, and followed the proſecutor while he was conducting the boy towards Temple-bar, walking ſometimes before, and ſometimes behind them, until they came to the top of Arundel-ſtreet, when he ſtruck the proſecutor a violent blow acroſs the noſe and eyes with a razor-bladed knife, ſaying, "Damn you, ſir, let the boy go;" and it was proved by an accomplice, that four of them had that evening gone out to pick pockets, under an agreement to ſtrike or ſtab, or cut the noſe and eyes of any perſon who molested them. The wound bled profuſely; and upon examination

amination it appeared that the two great blood-veſſels on Mr. Kirby's forehead were divided; that there was a large tranſverſe wound acroſs the noſe, ſo wide open that the bone was viſible. It began from the right, and went acroſs the eye-lid, and acroſs the noſe. The two muſcles of the noſe were cut through. It proceeded to the left eye-lid, and terminated at the temple. A nerve was cut.

It alſo appeared in evidence, that in many old authors who have written on Surgery, ſuch wounds are called *ſlits*, but that *ſlit* is a word not made uſe of now. The word *ſlit* is underſtood as ſynonymous to the word *cut*; but the idea which was formerly conveyed by the word *ſlit* is now expreſſed in ſpeaking technically by the word *divided*.

The Jury found the priſoners guilty; but it was queſtioned, Whether ſuch *a cut* was a *ſlitting* within the letter of the Act, the wound not having perforated to the noſtril. It was accordingly referred to the conſideration of the Judges; and they were of opinion, That the offence deſcribed in the indictment was properly proved, and the conviction legal.

Both the priſoners were executed.

TICKNER'S CASE.

At the Old Bailey in February Seſſion, 1778, Thomas Tickner and Thomas Adams were indicted on the ſtatute 22 and 23 Car. II. cap. I. commonly called the *Coventry Act*; Thomas Tickner, for making an aſſault on William Jacob with a bill-hook, and ſlitting his noſe, with intention in ſo doing to maim and diſfigure the ſaid William; and Thomas Adams, for being preſent, aiding, and abetting in the ſaid felony.

The proſecutor was ſervant to a Mr. Cole, of Twickenham, within about a quarter of a mile of whoſe houſe the priſoner lived. About twelve o'clock at night, on the 16th of January, 1778, the proſecutor diſcovered the priſoners in a field belonging to his maſter, where Tickner was pulling up turnips. The proſecutor went up to Tickner, and ſpoke to him; but inſtead of making any reply, Tickner immediately ſtruck him on the noſe with a ſharp inſtrument fixed into a ſtick of wood, and hanging looſe, ſomething like a flail. The blow knocked him to the ground, and he received ſeveral blows after he was down, which rendered him ſenſeleſs for ſome time. He was carried to St. George's Hoſpital, and upon examination, a ſmall ſuperficial wound was found upon the right ſide of his noſe; a very large wound



wound upon his neck, immediately under the lower jaw; a cut upon his hand; a ſmall one in the right brow; and eight wounds on the top of his head. The cut upon the noſe had divided the *exteguments* of the noſe in an oblique direction; but did not go through the bones of the noſe. There is very little but ſkin covers the bones of the noſe, and it went to the bone, but did not penetrate into the noſtril. It was rather a cut or a ſcratch than a ſlit; but it was ſufficient to leave a mark viſible for a long time.

The evidence did not ſufficiently affect the priſoner Adams to put him upon his defence; but Mr. Juſtice Gould (preſent Mr. Juſtice Aſhhurſt, and Mr. Baron Perryn,) told the Jury, that he thought the evidence againſt Thomas Tickner, if they believed it to be true, ſufficient in law to convict him of the charge in the indictment; for that he conceived it was not neceſſary that either the malice aforethought, or the lying in wait, ſhould be expreſsly proved to be on purpoſe to maim or disfigure. The priſoner was engaged in a criminal matter; he was prepared with a weapon to defend himſelf againſt any oppoſer, and to ſupport himſelf in his unlawful deſign of ſtealing the turnips, and therefore was anſwerable for the conſequences which happened in the proſecution of his felonious intent. As to the ſlitting of the noſe, it had been adjudged in the caſe of one *Kirby*, that a ſeparating of the fleſh was ſufficient to bring the offender within the meaning of the Act of Parliament, and that in the preſent caſe the cut had reached the bone.

The Jury found the priſoner guilty; but on his receiving judgment, Mr. Serjeant *Glynn*, RECORDER, ordered the execution of the ſentence to be reſpited, until the opinion of the Twelve Judges could be procured, Whether this conviction was proper within the meaning of the ſtatute? the words of which are, "That if any perſon ſhall on purpoſe, "and of malice aforethought, and by lying in wait, unlaw- "fully cut out or diſable the tongue, put out an eye, *ſlit* "*the noſe*, cut off a noſe or lip, or cut off or diſable any "limb or member, of any ſubject of his Majeſty, with in- "tention in ſo doing to maim or disfigure, in any the mat- "ters above-mentioned, ſuch his Majeſty's ſubject; the per- "ſon ſo offending, his counſellors, aiders, and abettors, "knowing of and privy to the offence as aforeſaid, ſhall be "felons, and ſuffer death without the benefit of clergy."

The Judges were of opinion, That the conviction was right.

JOHN

JOHN MILLS's CASE.

In April Seſſion, 1783, John Mills was tried upon this ſtatute before Lord Chief Baron Eyre, for maiming on purpoſe, and of malice aforethought, and by lying in wait, one Thomas Braſier.

The COURT ſaid, a perſon who intends to do this kind of miſchief to another, and by *deliberately watching an opportunity*, carries that intention into execution, may be ſaid to *lie in wait on purpoſe*. It is not neceſſary that a man ſhould plant himſelf in any particular concealment, and effect the miſchief by ruſhing from his lurking-place, to bring the offence within the meaning of the ſtatute. If, having formed an intention to maim, he comes unawares behind the perſon he intends to maim, and takes a convenient opportunity of deliberately doing the injury, it is a *lying in wait*, although he does not take any particular length of time, or appear to uſe any extraordinary degree of preparation to perpetrate the miſchief.

MISCELLANEOUS CROWN CASES.

WOODCOCK's CASE.

At the Old Bailey January Seſſion, 1789, William Woodcock was tried before Lord Chief Baron Eyre, (preſent Mr. Juſtice Aſhhurſt, and Mr. Serjeant Adair), for the wilful murder of Silvia Woodcock, his wife.

It appeared in evidence, that ſhe was found lying in a ditch, in a narrow lane, called Robinſon's-lane, in the vicinity of Chelſea, in the county of Middleſex. She had received eight wounds about the head, face, and neck, which ſeemed to have been inflicted with the end of a blunt inſtrument; and was ſo exhauſted with the loſs of blood, as to be apparently dead. The body was taken to Chelſea poor-houſe, put into a warm-bed, and by medical aſſiſtance reſtored to life. In the courſe of eight hours, ſhe recovered her ſenſes to ſuch a degree, as to be enabled to give a credible relation of the circumſtances by which this cataſtrophe had



had happened. The overſeers of the pariſh, therefore, thought it expedient to deſire the attendance of a magiſtrate, for the purpoſe of taking her information in legal form.

Mr. Read, a Juſtice of the Peace for the county, attended at the poor-houſe accordingly. He found the informant, who was a baptized Mulatto, and native of the Eaſt-Indies, in a ſtate of perfect recollection. He told her, that he was a magiſtrate come to take her examination, and admoniſhed her to ſpeak the truth; and as ſhe appeared ſenſible of the impiety and dangers of falſehood, he adminiſtered an oath to her, and received her information, which he reduced, in her own words, into writing. He afterwards read it over to her with great deliberation, and gave it to her to ſign; and ſhe made her mark on the paper in approbation of its contents. The magiſtrate then ſigned it himſelf; and being proved on the trial, it was read in evidence.

It alſo appeared, from the evidence of the ſurgeons, that ſhe died in about eight and-forty hours after the examination had been taken, and that it was impoſſible from the firſt moment that ſhe could live long; but that although ſhe retained her ſenſes to the laſt moment, and repeated the circumſtances of the ill uſage ſhe had received, ſhe never expreſſed or ſeemed ſenſible of her approaching diſſolution. The evidence, independent of the *information* or *declarations* of the deceaſed, was of a very preſſing and urgent nature againſt the priſoner.

Under theſe circumſtances a queſtion aroſe with the COURT, Whether the evidence which had been obtained from the deceaſed could legally be left with the Jury? The learned Judge therefore ſtated the caſe to them, independent of that evidence; and then ſtated his opinion of the admiſſibility of the examination to the following effect.

LD. CH. BARON EYRE.—If I was ſatisfied that the caſe was quite full, without the circumſtances which the deceaſed has diſcloſed, I ſhould willingly omit to ſtate them as evidence againſt the priſoner, becauſe there is ſome difficulty as to the legality of their admiſſion. Great as a crime of this nature muſt always appear to be, yet the enquiry into it muſt proceed upon the rules of evidence. The moſt common and ordinary ſpecies of legal evidence conſiſts in the depoſitions of witneſſes taken on oath before the Jury, in the face of the Court, in the preſence of the priſoner, and received under all the advantages which examination and croſs-examination can give. But, beyond this kind of evidence, there are alſo two other ſpecies which are admitted

by

by law: the one is the dying declaration of a perſon who has received a fatal blow: the other is the examination of a priſoner, and the depoſitions of the witneſſes who may be produced againſt him, taken officially before a Juſtice of the Peace, by virtue of a particular Act of Parliament, which authorizes Magiſtrates to take ſuch examinations, and directs that they ſhall be returned to the Court of Gaol Delivery. This laſt ſpecies of depoſition, if the deponent ſhould die between the time of examination and the trial of the priſoner, may be ſubſtituted in the room of that *vivâ voce* teſtimony which the deponent, if living, could alone have given, and is admitted of neceſſity as evidence of the fact.

In the preſent caſe a doubt has ariſen with the Court, to which doubt I entirely ſubſcribe, whether the examination of the deceaſed, taken in writing at the poor-houſe by Mr. Read, the magiſtrate, is an examination of the nature I have laſt deſcribed? It was not taken, as the ſtatute directs, in a caſe where the priſoner was brought before him in cuſtody; the priſoner therefore had no opportunity of contradicting the facts it contains. It was not in the diſcharge of that part of Mr. Read's duty, by which he is, on hearing the witneſſes, to bail or commit the priſoner; but it was a voluntary and extrajudicial act, performed at the requeſt of the overſeer, and although it was a very proper and prudent act, yet being voluntary, and under circumſtances where the Juſtice was not authoriſed to adminiſter an oath, it cannot be admitted before a Jury as evidence; for no evidence can be legal, unleſs it be given upon oath, judicially taken.

But although we muſt ſtrip this examination of the ſanction to which it would have been intitled, if it had been taken purſuant to the directions of the Legiſlature; yet ſtill it is the declaration of the deceaſed, ſigned by herſelf, and it may be claſſed with all thoſe other confirmatory declarations which ſhe made after ſhe had received the mortal wounds, and before ſhe died. Now the general principle on which this ſpecies of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falſehood is ſilenced, and the mind is induced by the moſt powerful conſiderations to ſpeak the truth: a ſituation ſo ſolemn, and ſo awful, is conſidered by the law as creating an obligation equal to that which is impoſed by a poſitive oath adminiſtered in a Court of Juſtice. But a difficulty alſo ariſes with reſpect to theſe declarations; for it has not appeared, and it ſeems impoſſible to find out, whether the deceaſed herſelf apprehended that ſhe was in ſuch a ſtate of mortality as would



would inevitably oblige her ſoon to anſwer before her Maker for the truth or falſehood of her aſſertions. The ſeveral witneſſes could give no ſatisfactory information as to the ſentiments of her mind upon this ſubject. The ſurgeon ſaid ſhe did not ſeem to be at all ſenſible of the danger of her ſituation, dreadful as it appeared to all around her; but lay, ſubmitting quietly to her fate, without explaining whether ſhe thought herſelf likely to live or die. Upon the whole of this difficulty, however, my judgment is, that inaſmuch as ſhe was mortally wounded, and was in a condition which rendered almoſt immediate death inevitable; as ſhe was thought by every perſon about her to be dying, though it was difficult to get from her particular explanations as to what ſhe thought of herſelf and her ſituation; her declarations, made under theſe circumſtances, ought to be conſidered by a Jury, as being made under the impreſſion of her approaching diſſolution; for, reſigned as ſhe appeared, ſhe muſt have felt the hand of death, and conſidered herſelf as a dying woman. She continued to repeat the facts ſhe diſcloſed rationally and uniformly, from the moment her ſenſes returned, until her tongue was no longer capable of performing its office. Declarations ſo made are certainly intitled to credit; they ought therefore to be received in evidence: but the degree of credit to which they are entitled muſt always be a matter for the ſober conſideration of the Jury, under all the circumſtances of the caſe.

The priſoner was convicted, and executed.

JOHN COGAN'S CASE.

At the Old Bailey in May Seſſion, 1787, John Cogan was indicted on the ſtatute 2 Geo. II. c. 25, for uttering and publiſhing as true a certain forged will and teſtament, purporting to be the laſt will and teſtament of James Gibſon, &c.

The will produced in evidence began thus: "James Gib- "ſon do hereby," &c. leaving out the pronoun of the firſt perſon. The will recited in the indictment began with the pronoun, "I James Gibſon do hereby," &c.

The Court held this variance fatal to the validity of the indictment, and the priſoner was of courſe acquitted.

In the July Seſſion following he was again indicted before Mr. Juſtice Wilſon (preſent Mr. Serjeant Adair, then Recorder), for falſely uttering and publiſhing as true a certain falſe, forged, and counterfeited will and teſtament, with a certain mark thereto ſet, purporting to be the laſt will and teſtament

teſtament of James Gibſon, late a ſeaman on board the Vigilant, &c. which ſaid falſe, forged, and counterfeited will and teſtament is in the words and figures following; that is to ſay, "James Gibſon do hereby," &c. leaving out the pronoun "I," and reciting a fac-ſimile of the will.

The priſoner being put to the bar, on his arraignment pleaded *autre fois acquit*. The plea was taken *ore tenus*, and recorded by the Clerk of the Arraigns; who replied to it, on the part of the Crown, *nul tiel record*.

To prove the plea the record of the priſoner's acquittal in May Seſſion was produced. On comparing it with the preſent indictment, it appeared, as above ſtated, that the priſoner had been acquitted of uttering a forged will, beginning, "I James Gibſon do hereby," &c. but that he was now indicted for uttering a forged will, beginning, "James Gibſon do hereby," &c. The queſtion therefore was, whether this record was legal evidence of his having been acquitted of the ſame offence? And after argument by the priſoner's Counſel, in which he chiefly relied upon Lord Hale's conſtruction of Vaux's caſe, as reported by Lord Coke, the Court rejected the proof as inſufficient; and the priſoner pleaded the general iſſue, over to the felony, and the Jury found him guilty of the offence.

During the courſe of the trial, James Gibſon, the ſuppoſed teſtator of the forged will, was produced and ſworn as an evidence on the part of the crown. Upon this circumſtance a doubt aroſe, whether the priſoner had been legally convicted; the indictment charging him with having uttered or publiſhed as true a certain *Will and Teſtament*, and there being no ſuch inſtrument, in contemplation of law, as the *Will and Teſtament* of a man who is living, for until the death of a teſtator, his will cannot exiſt, either in fact or in law; and upon this doubt the judgment was reſpited, and the caſe referred to the conſideration of the *judges*.

In the June Seſſion, 1778, the priſoner was put to the bar, and Mr. Juſtice Wilſon delivered the opinion of the *judges* to the following effect.—The inſtrument which the law takes notice of under the name of *a will*, is in a man's own power during his life, and therefore no inſtrument of writing is conſidered as a laſt will until the teſtator is dead. Upon the trial of this indictment it appeared that James Gibſon, whoſe will was charged to be forged, was alive, and produced as a witneſs, and I was in ſome doubt, whether, under theſe circumſtances, an inſtrument bearing the ſimilitude of a laſt will could be conſidered within the meaning of the ſtatute upon which the indictment is founded.

The caſe was laid before *twelve judges*, and, on mature deliberation, they have decided that the doubt was without foundation.

The fact of the priſoner's having uttered this will, knowing it was forged, was very clearly proved at the trial. He told the Proctor that James Gibſon, the ſuppoſed teſtator, was dead, and produced a letter to the ſame effect, to corroborate the aſſertion. By this means he obtained a probate as the executor named in the will; and the judges are all of opinion, that if a forged inſtrument, *purporting* to be a laſt will and teſtament, be uttered and publiſhed as a true laſt will and teſtament, under circumſtances manifeſting an intention to defraud, it is equally within the meaning of the Act of Parliament, whether the ſuppoſed teſtator be in fact alive or dead. This opinion is founded on the authority of ſeveral caſes.

In the year 1753, Timothy Murphy was tried in this Court for forging a ſeaman's will; and though the man whoſe will was forged was alive, he was convicted and executed.

In the year 1773, *John Stirling*, a ſtudent in the Temple, was tried in this court for forging a will in the name of his laundreſs, by which means he obtained a conſiderable ſum of money which was inveſted in her name in the public funds; and he was convicted and executed, though the laundreſs was then alive.

In the year 1754, Anne Lewis was indicted upon this ſtatute for uttering and publiſhing as true a forged power of attorney from Elizabeth Tingle, adminiſtratrix of her father Richard Tingle, deceaſed, a marine on board the Hector. It appeared that Richard Tingle had died childleſs; and a doubt was conceived, whether, ſince there never was ſuch a perſon as Elizabeth, the daughter of Richard Tingle, the offence was forgery within the meaning of the ſtatute? And *eleven* of the *judges* were of opinion, that as the inſtrument forged wore the appearance of a power of attorney, it was within the Act, notwithſtanding the deed which ſhe had publiſhed, was impoſſible to be true.

There is alſo another caſe, the *King* v. *Bolland*, who was indicted in this court for forging the indorſement on a promiſſory note in the name of "James Banks," whom he repreſented as a wine and brandy merchant, living in Rathbone-place; but in fact no ſuch perſon ever exiſted; and, upon the opinion of the judges being taken, Bolland was executed.

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In conſequence of this determination the priſoner received judgment of death.

MARGARET CAROLINE RUDD'S CASE.

In the month of March, 1775, it was diſcovered, that three bonds had been forged in the name of William Adair, Eſq; of Pall-Mall. The firſt, dated in October, 1774, for 3300l. A ſecond, dated in December, 1774, 5300l. And a third, dated in January, 1775, for 7500l. Suſpicion fell upon Robert Perreau of Golden-Square, upon his brother Daniel Perreau of Harley Street, and upon Mrs. Rudd, who lived with Daniel Perreau. On the 15th and 17th March Mrs. Rudd made information before Sir John Fielding and two other Juſtices, by which ſhe confeſſed that ſhe had ſigned the bond of 7,500l. under very particular ſolicitations from Robert Perreau; and that he and Daniel Perreau, holding a penknife to her throat, had violently threatened her life in caſe ſhe refuſed, and, by that means, forced her to comply. The magiſtrates conceiving this to be a confeſſion of her own guilt, admitted her in the character of an accomplice, as a general witneſs for the crown as to *all* the forgeries; telling her that if ſhe would ſpeak the whole truth, not only in reſpect to the bond in queſtion, but of *all other forgeries*, that then ſhe ſhould be ſafe: but ſhe denied having any knowledge of, or concern in, any of the other bonds. On the 1ſt June, 1775, Robert Perreau was convicted for *uttering* the bond of 7,500l. knowing it to be forged, and Daniel Perreau was convicted of uttering the bond of 3300l. It appeared upon Robert Perreau's trial, from the evidence of Mr. Drummond, that Mrs. Rudd had confeſſed to him that ſhe was guilty of forging the bond of 7,500l. and that Robert Perreau was innocent. Upon this information the court iſſued a warrant againſt her, by virtue of which ſhe was committed to anſwer all ſuch matters and things as ſhould be objected againſt her touching the ſaid felony and forgery. On the 7th June a detainer was lodged againſt her upon the oath of Sir Thomas Frankland, for forging the bond of 7,500l. and on the 3d July another detainer was lodged againſt her on the oath of Robert Perreau's wife, for having forged the bond of 7,500l. Under theſe circumſtances ſhe obtained a Habeas Corpus to the Court of King's Bench, with a view to be admitted to bail, and the above commitments were accordingly returned to the Court.

Mr. *Davenport*, for the defendant, contended, that as ſhe had been admitted an evidence for the crown by the Juſtices of Peace, and had, under the faith and confidence of that admiſſion, made a diſcloſure of the facts ſhe was acquainted with, it would be a breach of public faith to deprive her of the benefits ſhe was thereby led to expect. He alſo urged the circumſtances of the defendant's health being ſuch as might, in all probability, be endangered by the confinement, if ſhe was remanded.

LORD MANSFIELD. It appears by the return to this writ, that the priſoner is detained in cuſtody by two orders of the court of ſeſſions and gaol delivery at the Old Bailey, for the forgery of two ſeveral bonds. It appears alſo, that ſhe is further detained by a warrant from a Juſtice of Peace for uttering one of theſe bonds knowing it to be forged: therefore, though this Court has undoubtedly a diſcretionary power to bail in all caſes whatſoever, yet as the ſeſſions are ſo near, and the offence committed by the priſoner is of ſuch a magnitude as that of repeated forgery, there is no colour for the preſent application upon the ground of that general diſcretion. As to the next allegation, that her ſtate of health is ſuch as to be endangered by the confinement, it is not of itſelf a ſufficient circumſtance, in ſuch a caſe, to induce the Court to interpoſe in her behalf.

A third ground which has been urged in ſupport of the preſent application is this: that the priſoner has been drawn in by promiſes and aſſurances to anſwer to an examination, and to ſwear to it on oath, which ſhe would not have done, but from a confidence that thoſe promiſes and aſſurances would have been kept and performed.

The inſtance has frequently happened, of perſons having made confeſſions under threats or promiſes: the conſequence as frequently has been, that ſuch examinations and confeſſions have not been made uſe of againſt them on their trial. But it has been urged, that the priſoner in this caſe is an accomplice who has been admitted to give evidence; that ſhe has already given evidence, and is further ready to give evidence, to convict her partners in the buſineſs; and therefore, that ſhe is entitled by law to the king's pardon, and to a pardon which would operate in bar of her own crime. If ſhe had ſuch a right, we ſhould be bound *ex debito juſtitiæ* to bail her. If ſhe had not ſuch legal right, but yet came under circumſtances ſufficient to warrant the Court in ſaying that ſhe had a title of recommendation to the king for a pardon, we ſhould bail her for the purpoſe

poſe of giving her an opportunity of applying for ſuch pardon.

There are three ways in law and practice which give accomplices a right to a pardon; and there is one mode which entitles them to a recommendation to the king's mercy.

The three legal ways are, firſt, in the caſe of approvement, which ſtill remains a part of the common law, though, by long diſcontinuance, the practice of admitting perſons to be approvers is now grown into diſuſe: ſecondly, the caſe of perſons who come within the ſtatutes 10. and 11. of Will. III. c. 23. ſ. 5. and 5. Ann. c. 31. ſ. 4. and thirdly, the caſe of perſons to whom the king has, by ſpecial proclamation in the Gazette or otherwiſe, promiſed his pardon.

Approvers have a right to a pardon, perſons within the ſtatutes of William and Anne have a right to a pardon, and the other claſs of offenders who come in under the royal faith and promiſe have a right to a pardon; and in all theſe caſes the Court will bail them, in order to give them an opportunity of applying for a pardon.

There is, beſide, a practice which indeed does not give a legal right; and that is, where accomplices having made a full and fair confeſſion of the whole truth, are in conſequence thereof admitted evidence for the Crown, and that evidence is afterwards made uſe of to convict the other offenders. If in that caſe they act fairly and openly, and diſcover the whole truth, though they are not entitled of right to a pardon, yet the uſage, the lenity, and the practice of the Court is, to ſtop the proſecution againſt them, and they have an equitable title to a recommendation for the king's mercy.

The ſtatutes of William and Anne are to be laid out of this caſe: firſt, becauſe they are confined to the diſcovery of particular offences only, of which forgery is not one: ſecondly, becauſe they relate only to perſons who are at large; beſide which, to entitle themſelves to a pardon, they muſt actually convict two offenders at leaſt; for if their confeſſion be ſuch on their trial as the jury gives no credit to, they are liable to proſecution. Theſe ſtatutes are therefore quite foreign to the preſent caſe, as are likewiſe all promiſes of pardon from the Crown by proclamation.

There remains, therefore, only the equitable practice which gives a title to recommendation to the mercy of the Crown.

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The law of approvement (in analogy to which this other practice has been adopted, and ſo modelled as to be received with more latitude) is ſtill in force, and is very material.

A perſon deſiring to be an approver, muſt be one indicted of the offence, and in cuſtody on that indictment: he muſt confeſs himſelf guilty of the offence, and deſire to accuſe his accomplices: he muſt likewiſe upon oath diſcover, not only the particular offence for which he is indicted, but all treaſons and felonies which he knows of: and after all this, it is in the diſcretion of the Court, whether they will aſſign him a coroner, and admit him to be an approver or not: for if on his confeſſion it appears that he is a principal, and tempted the others, the Court may refuſe and reject him as an approver. When he is admitted as ſuch, it muſt appear that what he has diſcovered is true; and that he has diſcovered the whole truth. For this purpoſe, the coroner puts his appeal into form; and when the priſoner returns into Court, he muſt repeat his appeal, without any help from the Court, or from any by-ſtander. And the law is ſo nice, that, if he vary in a ſingle circumſtance, the whole falls to the ground, and he is condemned to be hanged: if he fail in the colour of a horſe, or in circumſtances of time, ſo rigorous is the law, that he is condemned to be hanged; much more, if he fails in eſſentials. The ſame conſequences follow if he does not diſcover the whole truth: and in all theſe caſes the approver is convicted on his own confeſſion. See this doctrine more at large in *Hale's Pleas Crown*, vol. II. p. 226 to 236. *Staunf. Pl. Crown*, lib. II. c. 52 to 58. 3 *Inſt.* 129. —A further rigorous circumſtance is, that it is neceſſary to the approver's own ſafety, that the Jury ſhould believe him; for if the partners in his crime are not convicted, the approver himſelf is executed.

Great inconvenience aroſe out of this practice of approvement.—No doubt, if it was not abſolutely neceſſary for the execution of the law againſt notorious offenders that accomplices ſhould be received as witneſſes, the practice is liable to many objections. And though, under this practice, they are clearly competent witneſſes, their ſingle teſtimony alone is ſeldom of ſufficient weight with a Jury to convict the offender; it being ſo ſtrong a temptation to a man to commit perjury, if, by accuſing another, he can eſcape himſelf.

Let us ſee what has come in the room of this practice of approvement: a kind of hope, that accomplices who behave fairly and diſcloſe the whole truth, and bring others to juſtice, ſhould themſelves eſcape puniſhment, and be pardoned. This

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is in the nature of a recommendation to mercy. But no authority is given to a Juſtice of the Peace to pardon an offender, and to tell him he ſhall be a witneſs againſt others. The accomplice is not aſſured of his pardon; but gives his evidence *in vinculis*, in cuſtody; and it depends on the title he has from his behaviour, whether he ſhall be pardoned or executed. A Juſtice has no authority to ſelect whom he pleaſes to pardon or proſecute, and the proſecutor himſelf has even a leſs power, or rather pretence, to ſelect than the Juſtice of Peace.

It reſts therefore on uſage, and on the offender's own good behaviour, whether he ſhall be proſecuted or not. And if, in a proper caſe, an application was to be made to this Court, by an accomplice, to be bailed; that is, in the caſe of a perſon properly within the uſage, and who has fully complied with the requiſite conditions; I ſhould have no difficulty in bailing him, in order that he might apply for the King's pardon.

I am appriſed of the caſe of an accomplice upon a trial before Mr. Juſtice Gould, the circumſtances of which were as follow: An accomplice made a fair and full diſcovery to the ſatisfaction of Mr. Juſtice Gould, who tried the other offenders. The other witneſſes who were called upon the trial proved the identity of the accomplice by the deſcription of his perſon, but failed as to the identity of the other offenders; and the Jury, becauſe they doubted of the guilt of the others, acquitted them. The counſel on the part of the proſecution then contended, that the accomplice ought to be tried: but Mr. Juſtice Gould, under the circumſtances of the caſe, was of a contrary opinion, and I think very rightly.

Theſe being the general rules, let us ſee how far the preſent caſe is applicable to them, or in any degree falls within the reaſon of them. A bond is detected to have been forged: three perſons are apprehended on ſuſpicion; the two Perreaus and the priſoner. The Juſtices by their affidavit ſay, they admitted the priſoner as an evidence againſt the Perreaus, and ſwear they conſidered her as an accomplice: and they ſay they told her, "that if ſhe would ſpeak the truth, and the "whole truth, not only in reſpect of the bond in queſtion; "but of all the other forgeries, that then ſhe ſhould be ſafe; "if not, ſhe would be proſecuted." And the truth is, that in point of law ſhe was liable to be proſecuted for all.

What is the diſcloſure ſhe makes? It is this: "That Da"niel Perreau came with a knife to her throat, and threat"ened to kill her if ſhe did not forge one of the bonds in "queſtion; that under the terror of death ſhe forged it; "and that Robert Perreau brought the bond before ready "filled

"filled up." On this information ſhe is no accomplice; ſhe has confeſſed no guilt, if the fact is true that ſhe was under the fear of immediate death; for it is the will that conſtitutes a crime. She comes therefore in the character of a perſon injured, in the character of one to whom this violence has been done. Inſtead of being a party offending, ſhe is a party offended, as much as a man who has been robbed on the highway.—Further, the Juſtices do not treat her as an accomplice; for they ought to have kept her in cuſtody if ſhe had been an accomplice; but they diſcharged her, and they did right, there being no charge againſt her. But ſtill they ſay, in their affidavit, they did conſider her as an accomplice. Suppoſe they did really think her guilty, ſhe is not the more or leſs on that account an accomplice. But what is moſt material is, that her information is flatly contradicted by herſelf: for, on a voluntary confeſſion of her own, ſhe took the whole guilt upon herſelf; ſaid that ſhe alone forged the bond for 7500l.; and that Robert Perreau was an innocent man. If the Juſtices had known of this confeſſion, they could not have admitted her as an evidence: becauſe by that confeſſion ſhe makes herſelf not only a principal, but the only perſon guilty.

One of the bonds, for which ſhe is now detained, is dated three months prior to the bond in which Robert Perreau was concerned. Of this bond ſhe is totally ſilent, and denies any knowledge of the other two. Her information is therefore falſe, and the conditions offered to her by the Juſtices not complied with.

I agree with Mr. Davenport, that if ſhe had made a fair and full diſcloſure of all that ſhe knew, and the Juſtices had deceived her, under a promiſe or aſſurance or hope of a pardon from them, ſhe would be entitled to a recommendation to mercy: and in that caſe I ſhould have been of opinion to bail her, though the Juſtices had in ſtrictneſs no right to make ſuch a promiſe, or give her ſuch aſſurance. If any evidence or confeſſion has been extorted from her, it will be of no prejudice to her on the trial.

The three other Judges concurred; and Mrs. Rudd was accordingly remanded.

At the Old Bailey in September, 1775, Mrs. Rudd was put to the bar, on an indictment for forging the bond of 5300l. But Mr. Davenport contended, that, having been admitted as an evidence for the Crown, ſhe ought not to be put upon her trial. Mr. Bearcroft ſubmitted to the Court, that the condition upon which ſhe was admitted an evidence was, That ſhe ſhould diſcover *all* the forgeries of which the

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perſons and herſelf had been guilty, but that ſhe had knowingly ſuppreſſed that for which ſhe was at preſent indicted. The Judges differed in their opinions upon this ſubject, Mrs. Rudd was remanded, and the queſtion ſubmitted to the conſideration of the Twelve Judges.

Mrs. Rudd was again put to the bar, on the firſt day of December Seſſion following, and Mr. Juſtice Aſton delivered the opinion as follows:

Margaret Caroline Rudd, at the laſt September Seſſion, upon your being brought to the bar, to plead to ſeveral indictments found againſt you for forgery, it was inſiſted upon by your Counſel, that in point of law you ought not to have been put upon your trial at all, as you had confeſſed yourſelf to be an accomplice before the Juſtices of Peace for the county of Middleſex, and had been by them admitted as an evidence for the Crown, againſt your companions in guilt Robert and Daniel Perreau. The ground of that claim was founded upon the ſuppoſed merit of the diſcovery you had made: that being admitted to give evidence as an accomplice, and having performed your engagement to the publick, by being examined before the Grand Jury, and being ready to have given evidence upon the trial, if called upon, you was entitled to pardon; or not to have been proſecuted, that you might have time to apply elſewhere: that the conſtant practice in regard to accomplices becoming the King's evidence was, That they ſhould not be proſecuted for the offence they had confeſſed, or ſuch like offences: that a contrary conduct would be a breach of faith with you, and would diſcourage the future diſcovery of criminals, if after ſuch diſcloſures they were nevertheleſs to undergo proſecutions for their offences. To this it was anſwered, that the diſcovery meant by law or practice to entitle an accomplice to favour, muſt be a full, ample, and true diſcovery; and that it would never diſcourage the making ſuch diſcoveries if criminals offering themſelves as witneſſes, were made to underſtand, that to entitle themſelves to mercy or favour, they are to make a full diſcovery of all the offences about which they were queſtioned, and of all their accomplices in guilt And it was farther inſiſted, that you had not made a fair diſcloſure, at the time of your examination, of all you knew relative to the forgeries which had been committed and publiſhed, but that you ſtood charged by the Grand Jury with ſeveral other forgeries which you had denied the knowledge of. Upon the debate of this matter before the Bench of Gaol Delivery, the Judges preſent not all concurring in one opinion, and it being judged a point of great

great weight and importance in the criminal law, fit to be fully conſidered and finally ſettled, how far, under what circumſtances, and in what manner, an accomplice, received as a witneſs, ought to be entitled to favour and mercy; the farther conſideration of the matter was then deferred, in order that the opinion of all the Judges might be taken upon the point of law.

Eleven of the Judges have accordingly met, the Lord Chief Juſtice of the Common Pleas being abſent through indiſpoſition; and have maturely and deliberately conſidered of the matter, under all the circumſtances; and it falls to my ſhare to deliver, in your preſence, to the public, the ſubſtance of their reaſons upon the occaſion, that the ground of their reſolves may be rightly underſtood. All the Judges were of opinion, that in caſes not within any ſtatute, an accomplice, who fully and truly diſcloſes the joint guilt of himſelf and of his companions, and truly anſwers all queſtions that are put to him, and is admitted by Juſtices of the Peace as a witneſs againſt his companions, and who, when called upon, does give evidence accordingly, and appears under all the circumſtances of the caſe to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be proſecuted for his own guilt ſo diſcloſed by him, nor perhaps for any other offence of the ſame kind, which he may accidentally, and without any bad deſign, have omitted in his confeſſion; but he cannot by law plead this in bar to any indictment againſt him, nor avail himſelf of it upon his trial; for it is merely an equitable claim to the mercy of the Crown, from the Magiſtrates expreſs or implied promiſe of an indemnity, upon certain conditions that have been performed; it can only come before the Court by way of application to put off the trial, in order to give the priſoner time to apply elſewhere. Nine of the eleven Judges were of opinion, That all the circumſtances relative to a priſoner's claim of indemnity, in ſuch a caſe, not only may, but *ought* to be laid before the Court, to enable them to exerciſe their diſcretion, whether, upon the grounds before them, the trial ſhould be put off, and conſequently have intimation given that the priſoner ought not to be proſecuted; for the diſcretionary power exerciſed by the Juſtices of the Peace in admitting accomplices to be witneſſes, founded in practice only, cannot controul the authority of the Court of Gaol Delivery, and exempt, at all events, the accomplice from being proſecuted. Upon every motion made, upon collateral equitable grounds, the Court will ſee and examine into the whole truth, and conſequently ought

ought to be informed of all the circumſtances affecting the caſe.

The affidavit of the Juſtices, therefore, muſt in this caſe be neceſſarily taken into conſideration, to ſee upon what ground they admitted the priſoner as a witneſs. For if the Court looked no farther than the priſoner's own information, in the preſent caſe, they could not have learnt from thence that ſhe had ever been conſidered as an accomplice at all, and as ſuch have been admitted as a witneſs againſt the Perreaus, in either of the proſecutions. Upon their affidavit it appears that the public faith was not engaged but conditionally, and that there was an expreſs admonition given to the priſoner, not to conceal any part of the truth.

The ſame nine Judges alſo were of opinion, that if the matter ſtood ſingly upon the two informations of the priſoner, compared with the indictments againſt her, that ſhe ought to have been tried upon all or any of them; for from the priſoner's information, ſhe is no accomplice; ſhe has not confeſſed herſelf guilty of any offence at all. By their repreſentation, the ſhare ſhe has had in theſe tranſactions is perfectly innocent; but ſhe exhibits a charge againſt Robert and Daniel Perreau, the one ſoliciting her to imitate the hand of William Adair, from a paper he produces; the other forcing her to do the fact of forgery, under the threat and fear of death. Her two informations are contradictory, and every indictment that is preferred againſt her, proceeds upon a falſification of the account ſhe has given; for ſhe anſwers to the Juſtices' interrogation, that ſhe did not know of any other forgeries; ſo ſhe does not confeſs, make any diſcovery, or become a witneſs concerning theſe offences; and if ſhe has ſuppreſſed the truth, and not made a full and fair diſcloſure, ſhe forfeits all equitable claim to favour and mercy. But if ſhe has *told the truth, and the whole truth*, ſhe cannot be convicted. On the other hand, taking the affidavit of the Juſtices, and all the caſe into conſideration, if ſhe is guilty of the charge contained in the indictments preferred by Sir Thomas Frankland, the Judges are of opinion, as her informations before the Juſtices have no relation to theſe charges, they can in no light be applied to mitigate her offences.

Upon the whole, whether the priſoner is guilty or not guilty, is a fact ſtill to be tried by a Jury upon legal evidence only, without prejudice to the priſoner from any thing which has been inſiſted upon in point of law by her Counſel, to exempt her from any trial at all: for it would be hard indeed upon the ſubject, who has a right to advice and aſ-

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ſiſtance of Counſel in all matters and points of law that may ariſe upon his caſe, if the eventual deciſion of the Court againſt the points of law inſiſted upon in his behalf, ſhould prejudice the ſubſequent trial of the facts, which is ultimately to be governed by the rule of evidence, and to be decided by the verdict of the Jury. I hope and truſt, the facts will be tried without the leaſt attention to, or even a remembrance of, any one matter or thing whatever, which has either made its appearance in print, or been the ſubject of common converſation. I ſhall only add, that an accomplice, who deſires his trial may be put off, that he may apply for mercy under all the moſt regular pretenſions before laid down, confeſſes the guilt; but, under the circumſtances of this caſe, if the priſoner confeſſes theſe indictments, ſhe has no promiſe of mercy, and no claim to favour, for the reaſons aforeſaid. The Judges therefore are of opinion, That the trial ought to proceed; and I have authority to ſay, that the Lord Chief Juſtice of the Common Pleas concurs in that opinion.

In conſequence of this determination Mrs. Rudd was tried by Mr. Juſtice Aſton, preſent Mr. Baron Burland, and Mr. Serjeant Glynn, Recorder, for forging a certain paper writing, purporting to be a bond ſigned, ſealed, and delivered by William Adair, Eſq. in the penal ſum of 10,600l. conditioned for the payment of 5300l. with lawful intereſt to Robert Perreau, on the 23d of March, 1775, with an intention to defraud, 1ſt, William Adair, 2dly, Sir Thomas Frankland, Baronet. There were alſo other counts for uttering it with the like intention.

The firſt witneſs produced on the part of the proſecution was Henrietta Alice Perreau, the wife of Robert Perreau, who was then under ſentence of death for having knowingly uttered the bond of 7500l. Mr. Serjeant Davy, the priſoner's Counſel, aſked her, "Is it not your opinion, that "the fate of your huſband will depend on the conviction "of Mrs. Rudd?" To which Mrs. Perreau anſwered, "I "am not clear of that." He then aſked, "Do you not "hope, or expect, that the conviction of Mrs. Rudd will "be a means of obtaining your huſband's pardon?" To which Mrs. Perreau anſwered, "I have nothing but the "truth to ſay." On being preſſed to anſwer the queſtion directly, ſhe ſaid, "I don't hope for the conviction of Mrs. "Rudd, I hope Mr. Perreau's innocence will clearly ap-"pear." She was then aſked, "Whether ſhe did not ap-"prehend that Mrs. Rudd's conviction would contribute to

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"procure her husband's pardon?" To which she answered, "If Mrs. Rudd is found guilty, I suppose it will. I hope "it may be the means of procuring Mr. Perreau's pardon."

Upon this evidence it was submitted to the Court, that Mrs. Perreau was an *incompetent* witness; and the point was elaborately argued by the Counsel on each side. But the COURT were of opinion, That it was not an objection that would go to her *competency*, though it would go very strongly to her *credit*; and her testimony was accordingly received.

After a very long trial, the Jury brought in their verdict, "*According to the evidence before us*, NOT GUILTY."

SESSIONS CASES determined in the COURT OF KING'S BENCH, subsequent to the Publication of the last Edition of BURN'S JUSTICE.

THE KING *v. the Undertakers of the* AIRE *and* CALDER NAVIGATION.

The defendants were assessed to the poor at the rate of 1000l. per annum for their tolls, and 27l. per annum for their lands. They appealed against the former part of the assessment which the Sessions affirmed, subject to the opinion of the Court on the following

CASE:

"That the said rivers Aire and Calder were made navigable by an Act of Parliament of the 10th and 11th of *Will.* III. which act hath been amended by a subsequent act in the 14th *Geo.* III. cap. 96, under both which acts the undertakers are entitled to receive certain tolls and duties therein mentioned for all goods, &c. carried upon the said rivers or cuts therein mentioned, according to the distance which such goods shall be carried. The whole length of the navigation from Leeds to Wheeland measures 29 miles, of which 2790 yards in length, and no more, lie within the local limits of the township of Leeds. The whole tolls and duties arising upon the whole length of the navigation from Leeds to Wheeland, or Selby, from the 1st of January, 1785.

to the 1ſt of January, 1786, amounted to 8234l. 6s. 2d. excluſive of the tolls and duties ariſing from the ſaid navigation from Wakefield to Wheeland and Selby, and the average amount thereof for three years before the 1ſt of January, 1786, was 7628l. 7s. The proportion of the tolls ariſing from the 2790 yards, part of the length of the ſaid navigation, and lying within the local limits of the townſhip of Leeds, amounted to 403l. 1s. 10d. *per ann.* and though upon the face of the aſſeſſment the undertakers ſtand only aſſeſſed at and after the rate of 1000l. *per ann.* yet as the houſes and buildings within the townſhip of Leeds are, by the ſaid aſſeſſment, rated only at one moiety of the actual rents or real value, the undertakers ſtand actually aſſeſſed at and after the rate of 2000l. *per ann.* The ſaid undertakers of the ſaid navigation had, in a year commencing in July, 1785, and ending July, 1786, divided the ſum of 17,000l profits; but that ſum was made of many articles beſides the tolls and duties. The tolls and duties have been regularly and uniformly rated at the towns of Leeds and Wakefield from the year 1713, and at Wakefield from the year 1759, at the annual value of 1200l. *per ann.* the length of the navigation within the local limits of Wakefield, being 1189 yards, and the tolls and duties ariſing upon that branch of the navigation from Wakefield to Selby, or Wheeland, being more than that which ariſes upon the navigation from Leeds to Selby, or Wheeland. The mills, warehouſes, and other real property of the ſaid undertakers, have been rated from time to time in the townſhips or places where ſuch property lies. But the tolls and duties have not been rated in any of the townſhips through which the navigation runs between Leeds and Wheeland or Selby, or between Wakefield and Wheeland, or Selby, except at the towns of Leeds and Wakefield. From the year 1752, the ſaid undertakers have been invariably aſſeſſed for the tolls and duties, to the maintenance of the poor in the town of Leeds, at the value of 600l. *per ann.* and they, or their leſſees, have paid the aſſeſſments according to that value. The tolls and duties ariſing upon the whole length of the navigation have never in any one year during that ſpace of time, amounted to the annual ſum of 8234l. 6s. 2d. but in ſeven years during that time, they have been conſiderably under that annual ſum. In the year 1740, upon an appeal to this Court, it was ordered that the undertakers ſhould ſtand aſſeſſed at the value of 500l. *per ann.* In every land-tax act from the year 1709, is contained a clauſe that the undertakers ſhall not be aſſeſſed to the land-tax in any other part, townſhip, or

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place, through which the ſaid navigation runs, but at the towns of Leeds and Wakefield; and the undertakers have been uniformly aſſeſſed at Leeds at the ſame annual ſums for which they have been rated to the poor rates, and in the above-mentioned Act of Parliament of the 14th of his preſent Majeſty is contained a clauſe, which enacts "that the rivers or any of the cuts under the authority of that act ſhall not be ſubject or liable to the payment of any taxes, rates, or aſſeſſments, ſave and except ſuch taxes, rates, and aſſeſſments, as had been and then were uſually charged and aſſeſſed thereon."

LORD KENYON, Ch. J.—With reſpect to an objection which has been taken by Mr. Fearnley, that it does not appear by this caſe that the rate in queſtion was regularly publiſhed in the church: if the queſtion were whether an action of treſpaſs could be ſupported by the perſons whoſe goods were diſtrained for non-payment of the rate, there is no doubt but that the publication of the rate under the ſtatute of the 17th *Geo.* II. c. 3. muſt be proved: but the parties here come upon facts aſcertained by the court of ſeſſions, on which they aſk for the opinion of this court as to the queſtion of law ariſing upon thoſe facts; therefore it would be wandering from the point to ſeek objections which were never intended to be referred. Then it was ſaid at the bar, that a cuſtom, commencing in the year 1709, cannot controul the expreſs proviſions of an act of parliament: that is true; but contemporary uſage in ſuch a caſe would give ſome aſſiſtance in the conſtruction of an act of parliament. The obſervation which was made at the bar on the ſtatute 14 *Geo.* II. c 26, namely, that it prohibited any increaſe in the rate which exiſted at that time, does not appear to be well founded. On the fair conſtruction of that act of parliament, it might, perhaps, be decided that no other kind of rate than thoſe which were aſſeſſed at that time ſhould be impoſed; as for inſtance, if an highway rate, or church rate, or county rate, had not been collected before, the legiſlature meant that no ſuch new rate ſhould be impoſed for the future: but the *quantum* of the rates, which had been impoſed, muſt neceſſarily vary according to the exigencies of the caſe. For ſuppoſing at that time the land-tax had been at 2s. in the pound, it would be doing great violence to the words of the act of parliament to ſay that it never ſhould be raiſed in any future exigency. The remaining queſtion, and indeed the great one in this caſe, is, whether the rate in queſtion on this property has been aſſeſſed in a larger proportion than it ought. It is admitted, generally, that this

ſpecies



ſpecies of property is rateable; it is alſo admitted that the Juſtices at the ſeſſions are the proper judges reſpecting the equality or inequality of the rate. In the caſe of the king *v.* Brograve, the Court ſaid they could not enter into the inequality of the rate, unleſs it manifeſtly appeared to be unequal: and this rule appears to have been laid down with great wiſdom by the Judges who ſat in the Court at that time. It has been argued that, as the whole extent of this navigation is many miles, of which that which lies in Leeds forms but a ſmall part, the rate in queſtion exceeds its due proportion: but that is not the rule by which theſe proportions are to be aſcertained. It is well known that the duke of Bridgewater's navigation at Mancheſter extends thirty or forty miles, within three miles of the end of which the grand trunk empties itſelf, and of courſe the tonnage in that part of the navigation exceeds beyond all compariſon the proportion in any other part of it. So that it is moſt probable that the part of this navigation which comes into the town of Leeds is of greater value than any other part. However, I diſclaim forming my opinion upon any conjecture of this ſort, though it is probably well founded; it being enough for me to ſay, what was ſaid by this Court in the caſe reported in Burrow, that we cannot enter into the inequality of the rate, unleſs it be manifeſtly unequal upon the face of it. Therefore, without entering into any diſcuſſion of more points which are open to it, I am clearly of opinion that this rule ought to be diſcharged.

ASHHURST, J.—The greateſt part of the argument uſed by the counſel, who have argued in ſupport of this rule, is founded upon a ſuppoſition that every pariſh between the extremes of this navigation receives an equal benefit. But that in all probability is contrary to the fact; for moſt likely many barges are navigated near the town of Leeds which do not paſs any other part of the navigation. So that the proportion for which the profits of this canal have been rated in this pariſh does not neceſſarily exceed the *quantum*. The caſe then before us is extremely ſimple; for this Court never interferes in a queſtion of inequality of a rate, unleſs it manifeſtly appears on a rate itſelf to be unequal: now that does not ſo appear in this caſe; and therefore I am of opinion that it muſt be confirmed.

BULLER, J.—If the objection which was taken by one of the counſel, that the rate does not appear to have been publiſhed in the church, would hold, it would deſtroy every caſe of this ſort which comes before the Court. But the diſtinction between orders of Juſtices and ſpecial verdicts

has

has been long eſtabliſhed; in the latter, where it concludes generally, the whole caſe muſt appear upon record; but the very reverſe is the rule which obtains in the caſe of orders of Juſtices: for the Court will intend every thing to be right, which does not appear to be otherwiſe, and they will not entertain any doubt upon a ſubject upon which the Juſtices did not. Here the Court of Seſſions have ſaid that the rate was duly made; they made no queſtion about the publication of the rate, and they did not intend to leave any queſtion upon that head to the Court; then it becomes neceſſary to conſider thoſe facts in this caſe upon which the law ariſes: and it is material to obſerve, that it is not ſtated that the tolls are collected at any other place than Leeds and Wakefield; for if there were any other houſes in different pariſhes at which the tolls are collected, it would make a difference; but on this ſtate of the caſe we are bound to take it, that all the tolls are collected at theſe two places. Taking that fact therefore as clear, I think the caſe which has been decided in this court muſt govern the preſent. It is material to conſider at what place the toll becomes due. I agree that, if a perſon has property in Yorkſhire, and receives the profits of it in London, he ſhall not be rated for it in London; for a toll muſt be conſidered to be paid at the place where it becomes due. It is impoſſible to adopt the argument uſed at the bar, that the toll becomes due at the end of every mile for that mile; for it is an entire contract to carry the goods the whole diſtance intended, and the hire is payable at the place to which by that contract they are to be carried. The caſe of Putney-bridge (Douglas 305), is an illuſtration of the preſent; there the bridge is rated in Putney and Fulham pariſhes at 700l. a year in each, there being gates at each end; formerly there was no gate at the Putney end, and then the bridge was not aſſeſſed in Putney at all. With reſpect to the laſt objection on the act of the 14 *Geo.* II. c. 96, if that argument has any weight, it muſt go the length of ſaying, that the legiſlature intended that a certain ſum ſhould be raiſed at all events, neither more nor leſs: but that would be doing great injuſtice; for it is ſtated, that the tolls in Leeds amounted only to 400l. *per annum*, and yet at that moment they were rated at 600l. a year; and if the rates ſhould be reduced, it would be manifeſt injuſtice to ſay that the propietors of this navigation ſhould be ſtill rated at 600l. *per annum*.

GROSE, J.—This caſe is abundantly too clear to require any farther comment.

Rule diſcharged.

The KING *againſt the Inhabitants of* FILLONGLEY.

John Glover, his wife, and their ſix children, were removed from Fillongley to Kinwalſey, in Warwickſhire. The ſeſſions quaſhed the order, and ſtated the following caſe:

The pauper, John Glover, on the 1ſt January, 1786, and for ſome years before, rented, and reſided on, a tenement in the pariſh of Fillongley, of the yearly value of 10l. and upwards, and continued there until the 29th April in the ſame year, when he was removed by an order of removal from the pariſh of Fillongley to the hamlet of Kinwalſey: and on the ſame day on which he was delivered with the ſaid order of removal, he returned back to the tenement in the pariſh of Fillongley, where he reſided without making any new contract with his landlord for the ſame, and without any interruption, for about three quarters of a year, and then was removed by the preſent order to the ſaid hamlet of Kinwalſey. An appeal againſt the ſaid order of removal of the 29th April, 1786, was entered, but was not proſecuted.

LORD KENYON, Ch. J.—This caſe is abundantly too clear to raiſe any ſerious doubt. Nothing can be better eſtabliſhed, than that the order of removal unappealed from is concluſive as to the pauper's ſettlement at that time; but there is nothing in the order which prevents the pauper's return, provided he does not return in a ſtate of vagrancy. It is alſo clear, that it is not in the power either of the two magiſtrates who remove the pauper, or of the Juſtices at their ſeſſion on an appeal, to put an end to a contract between the parties reſpecting the taking of a tenement. As far as reſpects the ſettlement of the perſon removed, they may determine, but no farther. And that diſtinguiſhes this caſe from the King and Kenilworth: that was a caſe of maſter and ſervant, and there the Juſtices have a power of putting an end to the contract. But here, at the time of the firſt removal, the Juſtices had no right to put an end to the contract, nor can we ſee on what ground the pauper was removed; for it is ſtated that he rented and reſided on a tenement of 10l. *per annum*, which infers a contract. That contract was moſt clearly not diſſolved by the adjucation of the Juſtices, and then the pauper cannot be conſidered as returning in a ſtate of vagrancy. And though he did not return under a new contract, yet that was not neceſſary, for the

the old contract remained; and then by reſiding at Fillongley forty days after the removal, he gained a ſettlement. It has been ſaid that the court may preſume fraud in the firſt taking: but there is no rule better eſtabliſhed than that fraud is never to be preſumed: and, I believe, in a caſe for the opinion of this Court which was pregnant with fraud, they would not preſume fraud, becauſe it was not ſtated.

ASHHURST, J.—The firſt order of removal could not poſſibly reſcind the prior legal agreement between the pauper and a third perſon. And though an order is concluſive as to the ſettlement at the time when it is made, that is merely technical, and ſo far we are bound; therefore in this caſe it muſt be taken that the pauper had not gained a ſettlement in Fillongley at the time of the firſt removal. But when he returned, it was under the old contract, which had never been reſcinded. Then he did not return as a vagrant; but he came to the pariſh of Fillongley to ſettle on a tenement of 10l. *per annum*, and he there acquired a ſettlement by a reſidence for more than forty days. It is not neceſſary to determine here what would have been the effect of his reſiding in Fillongley for a ſhorter ſpace of time than forty days after the firſt order of removal. The caſe cited from Cadecott does not apply to the preſent; for it is there ſtated, that the pauper reſided on the premiſes againſt the conſent of the landlord; but, in this caſe, the pauper reſided under a contract.

GROSE, J.—This caſe is diſtinguiſhable from that of The King and Kenilworth for the reaſons given. I think, if we could proceed on ſuppoſition, that the real tranſaction was this: after the appeal againſt the firſt order was made, the Juſtices diſcovered that he was wrongfully removed, and then they agreed that he ſhould be at liberty to return to Fillongley on his dropping the appeal. However, we are to determine on the facts ſtated. And, for the reaſons given, I am of opinion, that the contract was not diſſolved by the firſt order; that the pauper had a right to return to the pariſh of Fillongley; and, by reſiding there more than forty days, he gained a ſettlement in Fillongley.

Rule for quaſhing the order of ſeſſions diſcharged.

The KING *v.* ST. NICHOLAS, NOTTINGHAM

The pauper, Charles Howell, ſettled in St. Nicholas in the town of Nottingham, which is a county of itſelf, was,



by indenture dated December, 1787, by the overſeers of St. Nicholas, by the conſent of the Mayor and an Alderman of Nottingham, bound apprentice unto Joſeph Birch, of Basford, in the county of Nottingham, until 21 years of age. This indenture is under the hands and ſeals of the churchwardens and overſeers of St. Nicholas, and allowed by the ſaid Juſtices, and ſigned by Joſeph Birch the maſter, *but is not executed by the pauper*; under which indenture the pauper ſerved in Basford five months, when he was legally diſcharged under the ſtatute of 20 *Geo.* II. cap. 29, by two Juſtices, from his apprenticeſhip, on account of ill treatment by the maſter. The boy then became a charge to Basford, and was removed to St. Nicholas's Nottingham, as the place of his legal ſettlement; and, on appeal to the Seſſions, the Court confirmed the order, being of opinion, that the overſeers, with the conſent of the juſtices of one county, cannot, under the act of the 43d. of *Eliz.* put out a pariſh apprentice from one county into another county, unleſs the apprentice execute the indenture: but ſubject nevertheleſs to the opinion of the Court of King's Bench, whether the pauper, by the ſervice in Basford under the ſaid indenture, and the circumſtances of this caſe, gained a ſettlement in Basford.

LORD KENYON, C. J.—This caſe is of very great importance; becauſe many poor children are bound apprentices into manufacturing counties, from counties where no manufactories are eſtabliſhed. It ſeems to me that the caſe of St. Margaret, Lincoln, has decided this; becauſe, on reading that caſe, no doubt can be entertained but that the indenture was there executed by the church wardens and overſeers only; for no queſtion could have ariſen as to the legality of the binding, if the apprentice himſelf had executed the indenture. If this were to be determined on the words of the ſtatute 43 *Eliz.* alone, they are extenſive enough to warrant ſuch a binding as the preſent; they are to bind apprentices "where the Juſtices ſhall ſee convenient;" and whether in or out of the pariſh is not ſpecified; they are not to be limited by any other rule than the propriety of the meaſure itſelf. But the great difficulty aroſe in my mind on another ſtatute, namely, the 8 & 9 *Wil.* III. cap. 30. § 5. That ſtatute, after reciting that doubts had ariſen, whether perſons to whom poor apprentices were to be bound were compellable to receive them, declares that they ſhall be compellable to receive them under certain penalties. Now if this *Act of Parliament* be commenſurate with that of the 43d *of Elizabeth*, and the one cannot be extended beyond the other,

other, it is a powerful reſtriction of the former ſtatute; for perſons reſiding in one pariſh cannot be puniſhed for not receiving apprentices bound from any other pariſh. But I have ſolved that difficulty in this way; if the maſter do not reject the binding, but aſſent to it, then there is the concurrence of all the parties neceſſary to give validity to the indenture: and if no objection be made to the binding before the apprentice has reſided forty days under it, he thereby gains a ſettlement. However, it is the wiſeſt way to abide by former deciſions; and that of *Rex* v. *St. Margaret, Lincoln*, has determined this point: and that deciſion ſhould be the more readily adopted, becauſe a contrary rule would be attended with infinite inconvenience to the publick. The legiſlature ſeeing that there were many poor perſons who had not the benefit of a parental education, and judging very wiſely and humanely that ſomebody ſhould take care of them, directed (by the 43 of *Eliz.*) that they ſhould be under the management of the churchwardens and overſeers of the poor, who were ſuppoſed to have the beſt opportunity of knowing the ſituation of the poor children, and required the interference of the Juſtices of the Peace as a check on the conduct of the churchwardens and overſeers. So that it ſeems the legiſlature did all that human wiſdom could do, by directing the Magiſtrates, with the churchwardens and overſeers, to do that for the poor children which their parents could not do for them.

ASHHURST, J.—However doubtful it may be, whether under the 43 *Eliz.* the churchwardens and overſeers, by the conſent of the Juſtices, have not a compulſory power of binding out of the pariſh, under the proviſion of the act, which ſays, they ſhall bind "where they ſhall ſee convenient;" at all events there can be no doubt but that they have the power of making ſuch a binding with the conſent of all the parties. Now here the maſter conſented by receiving the pauper, and the aſſent of the pauper may likewiſe be inferred from the whole of this caſe. It is not ſtated negatively that he diſſented; he did not object to the binding, but lived under the indenture five months; that implies his conſent; and it was only on the ſubſequent ill-treatment of his maſter that he applied for a diſcharge: now that very application is an acknowledgement on his part that the indenture was binding. The pauper then having ſerved more than forty days under the indenture, ought to have the benefit of the ſervice. If any objection could be ſupported againſt this binding, on account of the pauper's *being bound out* of the county, it would be productive of *great inconvenience*; for many children, living in pariſhes where

where there is no manufacture, would thereby be deprived of an opportunity of being inſtructed in beneficial trades, and be confined to the ſtations of day labourers. The caſe of St. Margaret, Lincoln, governs this.

GROSE, J.—I conſider that all the parties in this caſe conſented to the binding. If the apprentice had diſſented from it, he might have appealed,—ſo might the pariſh into which the pauper was bound; and by not having appealed, they muſt be taken to have conſented. Then this caſe falls within the determination of St. Margaret, Lincoln. And it would be productive of great confuſion and inconvenience, if that deciſion ſhould be departed from in a caſe like the preſent, and in which ſo many perſons are concerned. I therefore conſider my ſelf as bound by that determination.

Rule abſolute, and both orders quaſhed.

The KING *v.* MARY WESTPORT.

Two Juſtices removed Thomas Pretty, and family, from Bradford to St. Mary's Weſtport, both in the county of Wilts; on appeal the order was confirmed, ſubject to the opinion of the Court.

CASE.

Edward Pretty (the grandfather of the pauper) together with his wife and family, went to reſide in Bradford, under a certificate from the pariſh of St. Mary, Weſtport, in Malmſbury, dated June 21, 1714, acknowledging them to be legal inhabitants of St. Mary, Weſtport, and promiſing, for themſelves and their ſucceſſors, the churchwardens and overſeers of the poor for the time being, that they would receive the ſaid Edward Pretty, with his wife and family, when they ſhould be thereto requeſted, unleſs they, or either of them, ſhould obtain a legal ſettlement elſe where. The paupers reſided together in Bradford under the certificate till removed by the preſent order. Thomas, the elder ſon of the pauper Thomas Pretty, ſome years ago married, took a houſe in the ſame pariſh, and reſided a-part from his father's family. He is ſince dead, and has left an infant ſon, John, who now lives with his mother in Bradford, and is under the

the age of ſeven years. The paupers named in the order of removal, never aſked or received any relief from Bradford, or became perſonally chargeable, unleſs the pauper Elizabeth, under the circumſtances hereinafter ſtated, can be ſo conſidered: but Thomas Pretty, the ſon, after the ſeparation above-mentioned, aſked and received relief from Bradford during ſickneſs; and ſince his death his infant ſon has not been maintained by his grandfather, the pauper; but relief has been applied for by his mother for him, and occaſionally granted by Bradford for his ſupport. Thomas, the grandfather, knew that relief was ſo adminiſtered. The pauper, Elizabeth, at the time of her removal, was pregnant with a baſtard child, of which ſhe has ſince been delivered in St. Mary, Weſtport.

LORD KENYON, Ch. J.—Although this certificate is not in the uſual form, yet, as far as it relates to the queſtion now before us, it muſt be conſidered as a common certificate. And the ſingle queſtion is, whether theſe perſons, who have been removed, can, in the fair ſenſe of the words, be ſaid to have been actually chargeable to the pariſh of Bradford. Now it is negatived by the caſe that any of theſe parties received relief in perſon. But it is contended that they were virtually relieved, becauſe the ſon and the grandſon both received relief. But it muſt be obſerved, that, at that time, they were not members of the family of the *pater-familias* now removed; they lived apart from him, and formed another family of themſelves. Then it has been ſaid that a burthen has been thrown upon the pariſh by the relief of the ſon and grandſon, and therefore the grandfather was virtually chargeable, becauſe the 43 Elizabeth requires fathers and grandfathers to ſupport their children and grandchildren. But the propoſition haſtens to a concluſion too ſoon; for by that ſtatute they are not in all events to maintain their grandchildren, &c. but only when they are of ſufficient ability. Now the Juſtices are the proper judges of that ability; and the grandfathers, &c. are only to be called upon by an order of Juſtices. There is another ſection in the certificate act, which throws ſome light upon this ſubject; that directs, that every perſon who receives relief, and the wife and children of ſuch perſons cohabiting in the ſame houſe, ſhall wear a badge on the ſhoulder: this therefore is a ſtrong legiſlative interpretation of what is meant by the word "family" in that act; and it would be a very harſh conſtruction of the law to ſay that the grandfather, when his ſon and grandſon, who lived in a different houſe from

him,

him, received relief, could have been badged, or, as mentioned in the latter part of the ſame clauſe, ſent to the workhouſe. So that, on the fair conſtruction of this act of parliament, none of the perſons removed by this order can be ſaid to have been chargeable. And even if we could exerciſe any diſcretion upon the ſubject, we ſhould not be inclined to reſtrain the operation of the certificate act. The caſe of Walton v. Spark is very diſtinguiſhable from the preſent: there the condition of the bond, which was to indemnify the pariſh againſt the perſon therein-named, and his children, was broken. Then, as to the circumſtance of the daughter being with child, it is univerſally ſettled, that that is not a ſufficient ground for the removal of a certificate perſon. Perhaps it is rather a hard caſe, and we might wiſh the law to be otherwiſe in ſome inſtances. But indeed it is to be conſidered that, though the woman was pregnant, *non conſtat*, that the child would be a baſtard; and though it was probable, yet it was not certain, that any burthen would have fallen on the pariſh, for ſhe might have been married before ſhe was brought to bed.

ASHHURST, J.—No doubt ariſes from the particularity of this certificate; for the promiſe, by the certifying pariſh to receive the paupers when they ſhall be thereto requeſted, can only be taken to mean when they ſhould be legally requeſted. Now the perſons mentioned in the certificate had a right to reſide in Bradford under it till they became chargeable, when only the certifying pariſh could legally be requeſted to receive them. Then the queſtion is, whether or not any of the perſons removed actually became chargeable in ſuch a way as to warrant the pariſh of Bradford in removing them: now it does not appear that any of them fall within that deſcription. For as to the pregnancy of the daughter, it has been repeatedly determined, that a certificate perſon cannot be removed as being likely to become chargeable, but ſuch perſon muſt be actually chargeable; and in ſuch an inſtance as this the charge may be prevented by marriage. Then as to the relief which was given to the ſon and grandſon, it ſeems to me that that was not a ſufficient ground to remove the grandfather and his family living under a ſeparate eſtabliſhment. But it has been ſaid, that the grandfather was bound to maintain his ſon and grandſon: that is true under circumſtances; but then he muſt be of ſufficient ability and called upon by an order. Now here the relief was not given on the application of the grandfather; and, in order to extend the conſequences of this relief to him, the pariſh ſhould have firſt called upon him, when, if *he had refuſed, alleging* his inability, it might have perhaps been

been tantamount to a relief of the grandfather. But, as it appears here, we cannot say that it was a neceſſary act of the pariſh; it was a voluntary one; and perhaps the grandfather, if he had been applied to, might have relieved the ſon and grandſon.

GROSE, J.—The firſt queſtion ariſes on the effect of the certificate. Although that is different from the common form, yet I have no doubt in ſaying that it can have no other operation than what it derives from the 8th and 9th W. III. ch. 30. If it had, it would go a great way to defeat that ſtatute. For that act directs that a certificate, given in the terms therein preſcribed, ſhall oblige the pariſh, granting it, to receive the perſons therein mentioned when they ſhall become chargeable; and that then they ſhall be removed. But this is an undertaking to receive the perſons mentioned in it, when they ſhould be thereto requeſted; which is directly contrary to the ſtatute. Therefore I think this is void, unleſs it be conſidered as a certificate within the act. The next queſtion is, Whether that which is ſtated in the order of removal be true, namely, that the paupers were actually chargeable? Now, that is negatived by the caſe, which ſtates, that they were not in fact chargeable, unleſs we can ſay that they were ſo in law. Although this queſtion has never been expreſsly decided, I agree with the opinion delivered by Mr. J. Aſton, who was particularly converſant with this branch of the law. And, notwithſtanding it was extrajudicial, I cannot help paying a great reſpect to the opinion of ſo able a Judge. If the whole of a certificated family were removeable, becauſe one of them only became actually chargeable, it would be attended with great inconvenience; as for inſtance, if there were three or four young men in the family who were able, by their induſtry, to procure a competent maintenance, and their ſiſter became chargeable, it would be againſt the ſpirit of the act to make that a ground for removing them all. And I think the intent of the act will be fully anſwered by determining that, when any one of the certificated family becomes chargeable, he only ſhall be removed: any other determination would defeat the true purpoſes of the act. Then, as to the pregnancy of the daughter, no caſe has been cited to ſhew that a perſon under ſuch circumſtances can be removed; and I think ſhe was not removeable on that account.

Both orders quaſhed.

REX *v.* ANDREW TOOLEY.

The defendant was convicted under the 25th George III. c. 51. for letting to hire a horſe to travel poſt, from Totneſs *to Aſhburton*, and back again, not having a licenſe from the com-

commiſſioners of the ſtamp office. He appealed to the Seſſions, where the conviction was quaſhed.

CASE.

On the 4th of October, 1788, Richard Gee went to the appellant, a butcher of Totneſs, and hired a horſe to go from thence to Aſhburton, and back again; the price to be paid to the appellant for ſuch hire amounted to one ſhilling and ſixpence; and Richard Gee was to return with the horſe to Totneſs the ſame day; and it alſo appeared that the appellant was not a perſon licenſed to let horſes for travelling poſt.

The ſtatute ſays, that every poſt-maſter, who ſhall let to hire any horſe for the purpoſe of travelling poſt by the mile, or from ſtage to ſtage, ſhall pay 5s. for a licence; the duties are put under the management of the commiſſioners of the ſtamp-duties; and adds, that every horſe, hired by the mile or ſtage, ſhall be deemed to be hired to travel poſt within the meaning of the act, although the perſon hiring the ſame do not go or travel ſeveral ſtages upon a poſt-road, or change horſes; and although at the ſtage or place, at or to which ſuch horſes ſhall be hired, there ſhall not be any poſt-houſe; and although there ſhall not be any poſt ſettled or eſtabliſhed on the road upon which ſuch horſes ſhall be hired to go.

LORD KENYON, Ch. J.—The argument which has been urged againſt the order of Seſſions (namely, that going the ſtage, and back again, was equivalent to travelling two ſtages) would be well founded, if the act had ſtopped at the words "that every horſe, hired by the mile or ſtage, ſhall be deemed "to be hired to travel poſt." For, if the Legiſlature had only intended to ſubject every horſe ſo hired to the duty, they would not have ſubſequently added ſo many nugatory words: but the act goes on to ſay, "that ſuch ſhall be travelling poſt within the meaning of the act, although the perſon hiring the ſame do not travel ſeveral ſtages, or change horſes, and although there be not any poſt-houſe, or eſtabliſhed poſt-road." This proviſo is adapted to caſes which exiſt in various parts of the kingdom, and particularly in the road from Cheſter to Bath, great part of which is not that which is termed a poſt-road; there perſons do not travel from poſt-houſe to poſt-houſe; but they travel *quaſi* poſt. If a perſon be, in the popular ſenſe of the words, travelling poſt, he is within the meaning of the act of parliament. The popular ſenſe of the words is to be retained; and, when that is ſatisfied, the 42d ſection provides that the circumſtances there mentioned ſhall not exempt the perſon from paying the duty. But the perſon, *in this caſe going* on his buſineſs to a market-town and *back again, cannot* poſſibly be ſaid to be travelling poſt either within

within the ſpirit or the words of this act of parliament, which was evidently not intended to extend to every caſe of hiring a horſe; and, unleſs it did, this caſe is not within it.

ASHHURST, J.—This cannot be a hiring to travel poſt either within the ſpirit or letter of this Act of Parliament. There is a great deal in what the counſel for the defendant ſaid, that this ſort of hiring is, in effect, a hiring for a day, with a reſtriction that the hirer ſhall not go further than ſuch a place. One neighbour lets his horſe to another, to go from Totneſs to Aſhburton, and back again, which cannot be ſaid to be travelling poſt within the popular ſenſe of the words; and ſuch was the meaning of the Legiſlature.

GROSE, J.—If the Legiſlature had intended that every perſon, who lets horſes to hire for any purpoſe, ſhould take out a licence, the words "travelling poſt" need not have been inſerted in the act of parliament. Thoſe words muſt have meant ſomething; and they muſt be confined to their popular ſenſe, except in thoſe caſes which the Legiſlature has pointed out in the 42d ſection; in the expoſition of which I perfectly agree with my Lord Chief Juſtice. I do not know what the practice may be; but, if the argument uſed in favour of the tax were to prevail, the conſequence would be, that every clergyman, within either of the univerſities, who hires a horſe for the purpoſe of attending his church, would be equally liable to the duty for travelling poſt: but we cannot ſuppoſe that the Legiſlature meant to extend it to ſuch caſes. Order of Seſſions confirmed.

REX *v.* JOHN WEBBER.

The defendant was convicted for letting poſt-horſes without licence, and the Seſſions quaſhed the conviction.

CASE.

Jonathan Green, poſt-maſter for Exeter, when any expreſſes were delivered to him to be forwarded to London, uniformly cauſed them to be conveyed from Exeter to Honiton, being the firſt ſtage, and 16 miles diſtant, by the defendant, who lets horſes for that purpoſe. Such expreſſes have been, in every inſtance within the knowledge of the ſaid defendant, carried on horſeback by a boy and horſe provided by the defendant: and Green hath always paid the defendant three-pence a mile, and ſix-pence for the boy. The defendant may ſend whom he pleaſes, or go himſelf with the expreſſes. On the 25th of February laſt, a waiter from the Oxford Inn brought an expreſs to Green, directed to the duke of Northumberland, to be immediately forwarded *to London*. Green incloſed it to the poſt-maſter-general in London,

London, which is the caſe of all expreſſes, and delivered it to Webber's boy, with directions to forward it immediately to Honiton; and has ſince paid Webber 4s. 6d. for conveying this expreſs to Honiton. The horſe upon which the boy rode in carrying this expreſs was the property of the defendant. Green pays the defendant once a quarter for carrying the expreſſes; and he was paid the ſaid 4s. 6d. in the laſt account ſettled at Lady-day.

LORD KENYON, Ch. J.---This queſtion depends on the conſtruction of a ſhort clauſe in the act of parliament. And it is true that under that act every letting to hire is not a letting to hire for the purpoſe of travelling poſt. We were of this opinion in the caſe of the King v. Tooley, in the laſt term; but, as we wiſhed that our judgment ſhould be ſatisfactory, we gave leave to the crown-officers to argue it again in caſe they had any doubts upon the ſubject; and I am happy to find now that no doubt is entertained about it. And I have alſo had an opportunity of knowing, ſince that determination, that our opinion coincides with that of the gentlemen who drew the act. Now, it has been argued here, that this defendant did not let a horſe for the purpoſe of travelling poſt, according to the popular ſenſe of thoſe words: but it is on that very ground that my opinion is formed; and I think that a horſe, let to carry a letter by expreſs, is in common *parlance* let for the purpoſe of travelling poſt. And, if we look back to the hiſtory of former times, we find that this mode of conveyance was called, not an expreſs, but flying-poſt. Perhaps, if this had appeared to be an expreſs ſent by the orders of government on public ſervice, it might have been otherwiſe: but I give no opinion on that queſtion. However, as it is not ſtated in this caſe, that it was a government expreſs, it is impoſſible to entertain the leaſt doubt on this queſtion. Then it was objected, that the defendant was not bound to pay this duty, becauſe the horſe was ridden by his own ſervant; but that would equally apply to almoſt all caſes of travelling poſt, where the driver is the ſervant of the owner of the horſes.

ASHHURST, J.--It has been argued, that we muſt preſume this expreſs was ſent on the account of government: but it is incumbent on the party, who claims the exemption, to prove that he comes within it. Therefore we cannot preſume it from the facts here ſtated; and the reverſe of it appears. This caſe then falls within the words of the act of parliament; and if we conſider that this was a tax on accommodation and luxury, and that every perſon ſending expreſſes is ſuppoſed to be of ability to pay it, it comes alſo within

within the meaning of the ſtatute; for it is in the popular ſenſe a travelling poſt.

Order of ſeſſions quaſhed.

The KING v. *the Inhabitants of* MACCLESFIELD.

CASE.

The pauper George Deane, being ſettled in Wildboarclough, was hired about fifteen years ago by F. Beſwick, of Macclesfield, for 11 months, at 10 guineas wages: at the end of 11 months the maſter and the pauper ſettled his wages for 11 months; and his maſter gave half-a-guinea over, ſaying, that he had been a good ſervant, and added, "You may as well ſtay on an end in your place; the place "ſuits you, and you ſuit the place." The pauper's anſwer was, "Very well, Sir, I have no objection." And the pauper continued to follow his maſter's buſineſs near three years. The pauper, being at Birmingham with his maſter's cart, was taken ill, and ſtayed there ſome time, which occaſioned him to loſe his ſervice. His maſter uſed to give him money during his ſervice; but the pauper kept no account. A few days after the pauper's return from Birmingham, his maſter ſettled with him; the pauper did not know in what manner, but ſuppoſed the money was right: he thought his wages would come to about four ſhillings a week. It did not appear to the Court, that the pauper or his children had gained any ſettlement in any other place.

Two Juſtices removed the ſaid Geo. Deane and his family from Macclesfield to Wildboarclough; the Seſſions on appeal quaſhed the order, ſubject to the opinion of the Court.

LORD KENYON, Ch. J.---It is clear that there muſt either be an expreſs or an implied contract for a year, in order to give the ſervant a ſettlement. An expreſs hiring for 11 months will not confer a ſettlement, unleſs the Seſſions find that it was fraudulent, and that a year's ſervice was intended, though only 11 months were expreſſed; as in a caſe, which I remember, where there was an hiring for 11 months, with an agreement to give in another month's ſervice. Now, in this caſe the firſt hiring for 11 months was not ſufficient to confer a ſettlement: but, when that time was elapſed, the maſter told the pauper, that he might as well ſtay on an end; which, in that part of the country, means an indefinite time. This ſecond hiring, therefore, muſt be conſidered as a general hiring, which the law conſtrues to be an hiring for a year. As to this expreſſion, referring to the time for which the pauper was originally hired, it is too refined: it only referred

to

to the nature of the ſervice in which he was before engaged. Then if we conſider the wages for which the pauper ſerved under the ſecond agreement, it negatives the idea, that the parties contracted for another 11 months for the ſame definite ſum which the pauper received under the firſt agreement; for it is ſtated, that he received about four ſhillings *per* week, which does not amount to the ſame apportionment of wages. Order of Seſſions confirmed.

The KING *againſt the Inhabitants of* OFFCHURCH.

Two Juſtices removed Henry Weſt, and Martha his wife, from Thurlaſton to Offchurch, both in the county of Warwick; which order was affirmed by the ſeſſions on appeal, ſubject to the opinion of the Court on the following

CASE.

J. Weſt, the father of the pauper H. Weſt, in January, 1765, and for the two next following years, rented and reſided upon a tenement of 100l. a-year in Offchurch, and was ſettled there. In January, 1767, the wife of J. Weſt, who was mother of H. Weſt the pauper, died; and in June, 1767, J. Weſt married again with one Jane Lockley, with whom he lived in Offchurch until the year 1770, when they both went to, and reſided at, Southam in the ſaid county, for three years, without doing any act to gain a ſettlement there. In 1773, they removed to Ladbroke, in the ſaid county, to a houſe which was veſted by a ſettlement in truſtees to the ſeparate uſe of the wife; with the uſual clauſe that her receipt ſhould be a diſcharge to the truſtees for the rents and profits; and that the rents ſhould not be ſubject to the huſband's debts. Weſt and his wife lived in the houſe from 1773 to the preſent time. The pauper H. Weſt was born in Offchurch in January 1765, and reſided there with his father until 1770. On his father's leaving Offchurch, the pauper was left with one R. F. Leeſon at Offchurch, to be taken care of, his father paying for his lodging and board. The pauper continued at Leeſon's at Offchurch for two years, and then went to, and reſided with, his uncle H. Haddon, who alſo lived at Offchurch, and continued to reſide with his ſaid uncle for about two years; during the whole of which time his uncle provided him with board, cloaths, lodging, and pocket-money, and he worked with his uncle Haddon, but he received no wages, and was not hired as a ſervant. At the end of two years the pauper went to his father's at Ladbroke, and ſtaid there

there a week; and then went to reſide with another uncle, William Salmon, of Weſton, with whom he lived ſix years, as he had done at his uncle Haddon's; his uncle Salmon providing him with board, cloaths, lodging, and pocket-money; he working for his uncle Salmon, without having been hired as a ſervant, or receiving any wages. On leaving his uncle Salmon, he went and lived three weeks with his father at Ladbroke. The pauper has never done any act to gain a ſettlement.

LORD KENYON, C. J.---Two queſtions ariſe in this caſe: and the firſt which I ſhall conſider is, whether the ſon continued to be part of his father's family during the time his father reſided at Ladbroke, ſo as to be intitled to the benefit of his father's ſettlement. This is the weakeſt caſe of emancipation that was ever attempted to be made out. When the father left the pariſh of Offchurch, the ſon was only five years old: now it cannot be pretended that at that time he was emancipated, and yet he then ceaſed to reſide in his father's family. It is alſo ſtated, that about two years afterwards, when he was about ſeven or eight years old, and paſt the age of a nurſe-child, he went to live with his uncle Haddon. Then, was he emancipated at that time? Ordinarily ſpeaking, one of theſe things muſt happen before the ſon can be ſaid to be emancipated; either he muſt have obtained a ſettlement for himſelf, or have become the head of a family, or at moſt he muſt have arrived at that age when he may ſet up in the world for himſelf. But here the ſon does not fall within either of thoſe deſcriptions: no time can be ſtated when the emancipation may be ſaid to have commenced.--- For when he went to live with his uncle Haddon, he was only eight years old at the moſt: and he could gain no ſettlement either by living with that uncle, or his other uncle Salmon, as a ſervant, becauſe the caſe ſtates, that he was not hired as a ſervant by either of them. Now, during all this time the father had a right to the cuſtody of the ſon, and might have obtained him by *habeas corpus*; for the parental care was not then done away. It is not neceſſary in theſe caſes of derivative ſettlements that the child ſhould remove with the father from place to place; for the ſettlement of the father will be communicated to the child. Otherwiſe children, who are ſent out into the world for education, and are of courſe ſeparated for a time from the father, might loſe the benefit of their father's ſettlement, and when they were about to return home would find themſelves excluded from parental care, if their parents had in the mean time gained a new ſettlement. How long the power of communicating

municating a derivative ſettlement may continue, it is not neceſſary to determine; for in this caſe it certainly remained longer than till the child was nine or ten years old; and that is ſufficient for the determination of this queſtion. Then, 2dly, it remains to be conſidered, whether the father gained a ſettlement in Ladbroke? and certainly the queſtion has ſome novelty in it. Where a perſon reſides on his own property, he gains a ſettlement by it; it having been conſidered as an excepted caſe out of the acts of parliament. Lord Macclesfield, fol. 257, firſt held, that, as a man cannot be diſſeiſed of his freehold, he is irremoveable from it, and reſiding 40 days on an eſtate of his own irremoveably, and gaining a ſettlement are ſynonymous terms. That indeed does not hold in all caſes now; for, by the 9th Geo. I. c. 7. a purchaſer of an eſtate for leſs than 30l. ſhall not acquire a ſettlement for any longer time than he reſides upon it. Then here, if this had been the father's own eſtate, the ſettlement would clearly have devolved on the ſon. But it is ſaid, that this is only the equitable eſtate of the wife. Now, ſuppoſing it had been the wife's legal eſtate, the huſband would have gained a ſettlement. Then muſt it be a legal eſtate, in order to confer a ſettlement? Certainly not. That was not doubted in South Sydenham and Lamerton, or in any of the other caſes. The queſtion in that was, Whether the next of kin without adminiſtration had any eſtate whatever? and it was held that he had not. In *Rex* v. *Cold Aſton*, a doubt was made, whether a next of kin, having the ſole right of adminiſtration, could not gain a ſettlement without taking out letters of adminiſtration. That ſhews that an equitable eſtate is ſufficient to give a ſettlement. And indeed this poſition is confirmed by many other caſes, and there are none in oppoſition to it. Then it is ſaid, that this is going ſtill farther, becauſe this is only the equitable eſtate of the wife; and that even the wife herſelf had no right to reſide upon it without the conſent of the truſtees. But ſhe might beyond all doubt, if ſhe had choſen, have elected to take the *eſplees* with her own hands, and that the truſtees could not have prevented. The objection then againſt the huſband's gaining a ſettlement here is too refined, for the wife had a right to reſide on her property, and to communicate it to the huſband. And although there is no caſe directly like the preſent, yet the principles of the decided caſes go the length of determining this.

Both orders quaſhed.

THE

THE LAWYER'S AND MAGISTRATE'S MAGAZINE.

For MAY, 1790.

Proceedings againſt JOHN FRITH for HIGH TREASON, at the OLD BAILEY, April 17, 1790, before LORD KENYON, Chief Juſtice; Mr. JUSTICE HEATH, and Mr. BARON HOTHAM.

THE Priſoner was indicted for High Treaſon in compaſſing the Death of the King; he having thrown a large ſtone with great violence towards his Majeſty's perſon, as he paſſed in the State Coach to the Parliament Houſe, but which fortunately ſtruck only againſt the ſide of the coach window.

Counſel for the Crown,

Mr. ATTORNEY GENERAL, Mr. SOLICITOR GENERAL.

Counſel for the Priſoner,

Mr. SHEPHERD and Mr. GARROW.

The Priſoner being put to the bar, Mr. Shepherd, one of his Counſel, addreſſed the Court.

Mr. Shepherd. My Lord, Mr. Garrow, and myſelf, are Counſel for Mr Frith: and though we are furniſhed with what we think a ſufficient defence, yet there is ſome very important evidence which might be procured before the next Seſſions, on behalf of Mr. Frith: and, on that account, we apply to the humanity of the Attorney General, to beg he would conſent to the poſtponing this trial to the next Seſ-

ſions. In this caſe we exerciſe our duty as counſel: Mr. Frith is entitled to the beſt of our judgment: whether he will chuſe to be guided by that, is certainly a conſideration for his own mind. But, Mr. Attorney General we do hope will conſent.

Court. This application is made on your judgment.

Mr. Garrow to Mr. Frith. Mr. Frith, we have been applying to the Court, or to Mr. Attorney General, to permit your trial to ſtand over till next Seſſions, upon our judgment; it appearing to us that your defence will be better arranged.

Priſoner. I object to it, on account of my health being in a bad ſtate through long confinement. I ſhould rather meet it now: it is depriving a ſubject of his liberty, and endangering his health.

Mr. Attorney General. Notwithſtanding what this unhappy gentleman has ſaid, I am given to underſtand that there may be ſome circumſtances in his ſituation; and likewiſe that he is not very well able, in point of pecuniary concerns, to be ſo ready in the collection of materials for his defence, as many other priſoners are: therefore if my friends are of opinion that he muſt go to his trial now under great diſadvantages, poſſibly ariſing from the laſt cauſe, as well as the other, I ſhall have no objection to give the gentlemen ſuch time as will enable them to collect ſuch evidence as they may chuſe.

Priſoner. Then I ſhall make an application to ſome Member of Parliament, or the Legiſlature. I therefore totally appeal againſt ſuch power of putting off the trial any further; and whoever dares to oppoſe me in that reſpect, I will repreſent him to the Legiſlature, or ſome Member of Parliament; either to General North, or ſome gentleman whom I have the honour of knowing.

Mr. Garrow. Mr Lord, we are put into an arduous ſituation. But for one, I feel it to be my duty to take upon myſelf, in oppoſition to the Priſoner, for the Priſoner's benefit, to pray that the Attorney General will conſent to poſtponing this trial.

Court. Mr. Attorney General has conducted himſelf on this occaſion, as he always does, exceedingly liberal and proper; and is ready to give all indulgence that humanity calls for; therefore it muſt ſtand over till next Seſſions.

Priſoner. I do not admit of it. And I ſhall make an application to Parliament, that I have been here three months in diſagreeable confinement; and the King has broke the mutual obligation between him and the ſubject: and the aſſault is of ſuch a ſimple kind of manner; and what I have

met

met with is of ſuch a nature, that I deſire to ſpeak by way of extenuation, and to plead guilty or not guilty to the facts. I ſhall then make an application as being illegally detained in priſon, that you will not admit a Britiſh ſubject to plead to the indictment: I therefore ſhall make an application to the Legiſlature, that you are violating the laws of this kingdom. I will not put it in the power of the gentlemen that are employed for me to put it off.

Court. It is impoſſible for the moſt inattentive obſerver not to be aware that there may in this caſe be a previous enquiry neceſſary: ſuch is the humanity of the law in England, that in all ſtages, both when the act is committed, at the time when the priſoner makes his defence, and even at the day of his execution, it is important to ſettle what his ſtate of mind is, and at the time he is called to plead, if there are circumſtances that ſuggeſt to one's mind that he is not in the poſſeſſion of his reaſon, we muſt certainly be careful that nothing is introduced into the adminiſtration of Juſtice, but what belongs to that adminiſtration. The juſtice of the law has provided a remedy in ſuch caſes; therefore I think there ought now to be an enquiry made, touching the ſanity of this man at this time; whether he is in a ſituation of mind to ſay what his grounds of defence here are. I know it is untrodden ground, though it is conſtitutional: then get a jury together to enquire into the preſent ſtate of his mind: the twelve men that are there, will do.

Priſoner to Mr. Garrow. I beg the favour to ſpeak to you.

Mr. Garrow. By all means, Sir.

Priſoner. The Privy Counſel were pleaſed to ſend the King's Phyſician to me, after I had appeared before my Lord Kenyon, on the 22d of January. I was examined at the Privy Counſel by Lord Camden; and they ſent the King's Phyſician to me. I made dates and memorandums of the Phyſician's viſits, likewiſe remarks that I ſpoke to him at various times; and of the Apothecary's viſits alſo; they perſevered in my being in perfect health, fit to meet my trial; and I have put down the converſations.

Mr Juſtice Heath. The Jury will take notice of that.

The Jury ſworn as follows:

"You ſhall diligently enquire, and true preſentment make, for, and on behalf of our Sovereign Lord the King, whether John Frith, the now priſoner at the bar, who ſtands indicted for High Treaſon, be of ſound mind and underſtanding, or not, and a true verdict give according to the beſt of your underſtanding. So help you God."

Mr. Shepherd. Mr. Frith, you are aware that the Gentlemen of the Jury, that have been juſt ſworn, are going to inquire whether you are in a fit ſituation to plead at this time, and to be tried. Now I wiſh you to ſtate to theſe gentlemen what reaſons you have to induce them to think you are; and to produce any memorandums.

Priſoner. I have had a phyſician attending me two months paſt. On the 22d of January I came into theſe circumſtances: and they were pleaſed to ſend the king's phyſician to examine me, whether I was perfectly in my ſenſes: I perſevered in being ſo, and would take no drugs from the Apothecary. I begged him to attend as a friend to me, to protect me from inſult, ſuppoſing there was any poſſibility that I could be inſulted in this great priſon: but if I had not been well, I would have had my own phyſician, Dr. Heberden, who attended my father formerly, when living: I looked upon him as a friend attending me, to prove that I was in my ſenſes, or any thing elſe. I made memorandums of his viſits, and the various converſations that we had together. I made memorandums likewiſe of letters: a letter which I wrote to Meſſ. Cox and Greenwood; and I have a copy of it, and one that I wrote about the 24th of February, during the time that the laſt Seſſions was here, when I thought I might be tried; I then re-copied it again. I then mentioned that a diſagreeable thing had happened, that General Clarke is coming home in diſgrace. To hide that infamy that has happened, they wiſhed to give it out that I was out of my ſenſes. The agents who had immediately freed me from the inconveniences I was under, they were ordered to deny the ſubject the liberty of drawing on his agent on the houſe where he had money to anſwer his bills. They acknowledged me to have been perfectly in my ſenſes at the time when I firſt came to England; I drew on them, and I have totally freed myſelf from the inconvenience I was under, from being improperly detained in Cheſhire. I was writing a letter of what was publickly given out concerning the ſubject: I then wrote to Meſſ. Cox, Cox, and Greenwood, to beg they may ſend down ſome gentlemen here, to prove how the liberty of the ſubject was invaded in 1787, in June, and ſuch letters will prove, that the 24th of laſt February, I was right in my mind then; and that now I re-copied it again about a fortnight ago: and it went through my attorney, to Meſſ. Cox, Cox, and Greenwood's houſe: that will prove the eſtate of my mind at that period of time.

Mr.

Mr. Garrow. Will you have the goodneſs, Mr. Frith, to ſtate to the Jury the circumſtance that took place on your arrival at Liverpool, about the Clergyman.

Priſoner. When I firſt arrived at Liverpool, I perceived I had ſome powers like thoſe which St. Paul had; and the ſun that St. Paul gives a deſcription of in the Teſtament: an extraordinary power that came down upon me, the power of Chriſt; in conſequence of my perſecution and being ill uſed, the publick wanted to receive me as a moſt extraordinary kind of a man; they would have received me in any manner that I pleaſed. When I went to St. Thomas's church I was there ſurpriſed to hear the Clergyman preach a moſt extraordinary Sermon upon me, as if I was a God: I found my friends wanted me to ſupport that kind of fanaticiſm in this country; this Sermon was printed afterwards by Eyre, the printer at Warrington. When I came to London to the King concerning ſome military buſineſs, I told him nothing about any ſupernatural abilities, or the power of God; when I went to the Infirmary over Weſtminſter-bridge, to the Aſylum, I was ſurpriſed to hear General Waſhington's late Chaplain, Mr. Duché; he ſaid, I remember the words, he ſaid, "See him cloathed in Grace," pointing to me; there were ſome ſupernatural appearances at that time, therefore I could wiſh the Privy Council, when I came to England, or the Parliament, might be witneſſes that I did not want to ſet up any kind of powers to the publick; but there are ſuch extraordinary appearances that attend me at this moment, that it is ſingular; and all I do daily is to make memorandums, daily to prove myſelf in my ſenſes; ſome friends in Cheſhire wanted me to ſet up ſome kind of fanaticiſm, ſome new branch of religion.

Mr. Garrow. Would you be ſo good, Mr. Frith, to inform the Court, as you have an opportunity now, of the complaint you made to me of the effect your confinement has upon you, and the pain in your ear?

Priſoner. In reſpect to the body of people, St. Paul when he was at Jeruſalem, the ſame kind of power then came down on the publick; there is both a kind of good and evil power which we are all liable to in this world; in conſequence of that I feel myſelf in a particularly diſagreeable ſituation in confinement; I am under a ſtate of ſuffocation almoſt, the divine ordinances weighing ſo very low down that I am entirely reduced to a ſhadow almoſt, that is all to me as if it was a death ſeemingly, I am ſo in a ſtate of confinement.

The

The Rev. Mr. VILLETTE *ſworn.*

Mr Garrow. I believe, Sir, you have had an opportunity of converſing with this gentleman ſince he has been in cuſtody. State the impreſſions that ſuch converſations made on your mind?

Mr. Villette. The firſt time I ſaw him I really thought from the appearance he had, that he was deranged in his mind; I took notice ſo to the man that had the care of him; ſome time after he ſent for a Bible; I ſent him one; then we had ſome converſation; and he told me he had a pocket volume of that book, but that they took it from him when he was before the Privy Counſel; he ſaid, I am much obliged to you: I went to him a few days ago; he was reading; he ſaid, it was the Pſalms; I then talked about his trial; and he then entered into ſuch converſation as you have heard about St. Paul and Chriſt.

Priſoner. I ſaid it was when I was landed at Liverpool, and was giving a narrative.

Mr. Garrow. From the whole of your intercourſe with him, did it appear to you that he was inſane?—I really thought ſo.

You think ſo now?—I do.

RICHARD AKERMAN, Eſq. *ſworn.*

Mr. Garrow. State from the converſation you have had with the priſoner, what was his conduct on the whole.

Mr. Akerman. I have heard ſuch converſation as you have heard in Court.

Priſoner. I have been very ſilent and cloſe for many reaſons, and to protect my perſon; I have read the pſalms, my Lord, as I had no other books.

Mr. SHERIFF NEWMAN *ſworn.*

Mr. Shepherd. Have you had any converſation with Mr. Frith ſince he has been in cuſtody?

Mr. Newman. Very frequently; I went the ſecond day after he was in Newgate: I went entirely out of curioſity; I found him a ſubject of great compaſſion: he began talking to me very deranged for the firſt ten minutes; I aſked him why he went over to Holland? He ſaid, he went eaſtward in purſuit of the light; I ſaid, what light? He ſaid, why you have read the ſcriptures? I ſaid, yes; ſays he, the ſame light that fell upon St. Paul when he went to Damaſcus. I ſaid, what brought you back; Why, ſays he, when I got there, I found the light was in the Weſt as well as in the

Eaſt.

Eaſt. He deſired to have the liberty of walking in the yard; and I conſulted Mr. Akerman: and he ſaid, there was an order concerning him. I found him every time in the ſame way: I was there once when Dr. Millan came down; I met him there; he for the firſt five minutes had doubts, but before he went away he was perfectly ſatisfied the priſoner was inſane; I have not the leaſt doubt, nor poſſibly can have a doubt; I frequently found him reading in the Book of Kings, and he told me he was learning the art of war, and he ſhould come to be a general, and he ſhould like to underſtand the art of making war as the ancients did.

Priſoner. I do not remember ſpeaking about that, and I made memorandums of my converſations with Mr. Newman. I never ſpoke about particular lights; I ſaid, when I went over to Holland, as the Miniſters neglected doing their duty to me as a ſubject, in not protecting me from the inſults of the body of people; ſtirring up licentiouſneſs, aiming at me; they drove me out of the kingdom; I went to Holland to ſhelter myſelf from the body of the people; but I do not remember ſaying any thing of following the light.

To Mr. Newman. Do you think it was abſolute incapacity of mind, or feigned or aſſumed?

Mr. Newman. I believe abſolutely that he is totally deranged, and not in the uſe of his ſenſes for ten minutes together; every day I ſaw him he was ſo, and of that there is not a doubt; I went at different times merely to make obſervations.

Mr. Garrow. Mr. Frith, are you acquainted with Mr. Burnſell the auctioneer?

Priſoner. Yes: he took an extraordinary liberty in putting into the Public Advertiſer, the third of February, a letter, dated the firſt, declaring me inſane; a moſt extraordinary liberty; I thought it prudent to keep a copy: I have made memorandums, but they have been taken from me by Colonel Amherſt, the ſame as Mr. Wilkes's papers were ſeiſed, a kind of alteration of the laws of the land, a kind of ſcheme to make a man appear inſane; to totally diſguiſe; to undo the liberty of the Britiſh ſubject; in fact, it is ſuch a concealed evil that I do not know where it will end.

M. Garrow. Mr. Burnſell had no ill-will to you?

Priſoner. He was only employed to hide the mutiny that thoſe applauſes of the Clergymen had occaſioned; he went to a perſon that lives with Mrs. Dowdſwell, in Upper-Brook-ſtreet; he had a letter, and was perhaps ſeed; the Clergyman declared me as a God, the body of the people as a man inſane; myſelf applying to the King merely to get my birth

birth again; when I went to my friend Mr. Burnſell, I ſpoke of no powers of God or Chriſt.

Mr. Garrow. Was that before the complaint that you was afflicted with in your ear?

Priſoner. Before that, the pain in my ear; ſhall I finiſh with reſpect to Mr. Burnſell?

Mr. Garrow. If you pleaſe.

Priſoner. I found he wiſhed to ſuppoſe me not right in my ſenſes, and that he could produce no proof; he has declared in the public papers, that I behaved in ſuch a violent manner, in his houſe, as totally to prove myſelf out of my ſenſes; I have the facts now on one ſide put down, and I can find no one circumſtance of the kind, as to put ſuch a letter into the news paper; if they wiſh to make a man appear inſane, he ſhould be taken before the Lord Chancellor, and there make a general declaration, ſome way or other; but it is done to interfere with the liberty of the ſubject.

Mr. Garrow. Mr. Frith, how long was you afflicted with that complaint in your ear?

Priſoner. I indured it: I ſuppoſed it merely as a trifling thing; but that complaint ariſes from a power of witchcraft, which exiſted about a hundred years ago, in this country; there is a power which women are now afflicted with; there is a power that rules now, that women can torment men, if they are in a room---over your head, they may annoy you by ſpeaking in your ear; I have had a noiſe in my ear like ſpeech; it is in the power of women, to annoy men publickly, even throughout the whole continent.

Mr. Garrow. Could you ſatisfy one of the Jury, that ſuch a noiſe exiſts in your ear at this time?

Priſoner. That there is a noiſe in my ear at this time? No, I am free from it now; but it is the power and effects of what they call witchcraft; or ſome kind of communication between women and men; but I have remained ſuch a chaſte man for theſe four years, that it has fallen upon me particularly; and the Phyſician, by leaving me a month ago, and viſiting me as a friend, will totally ſpeak to the fact; the laſt time he viſited me, was on the 19th of March; ſays he, I hope you will be reſtored, and fit to take your trial; but I know my friend Mr. Hogarth, I have ſeen him, and ſome people that are in Court, will be able to declare me in my ſenſes: I have ſaid little or nothing at all lately, and been totally ſilent, ſo that it is impoſſible for me to be in that ſtate. Shall I beg the favour to addreſs my Lord.

Lord Chief Juſtice. If you pleaſe, Sir.

Pri-

Priſoner. Do you recollect me; in the year 1773, when I applied to you in perſon, on a caſe of ſome landed property, between me and one Entwiſle, at Cheſhire; when you was a counſel, and was one of my counſel, with one Mr. Hughes, knowing me then, and likewiſe in October, at the Aſſizes, reſpecting ſome conteſted property, ſome landed property I have in Cheſhire; now that circumſtance may corroborate my declaration of the ſtate of my mind.

Lord Chief Juſtice. I do not recollect it.

MR. FULLER *ſworn.*

I have frequently ſeen Mr. Frith ſince he came from the Eaſt Indies; I have had opportunities of converſing with him at particular times.

Mr. Shepherd. Do you recollect any thing particular in his converſation that induced you to take notice of the ſtate of his mind?

Mr. Fuller. Yes, ſeveral times; on Chriſtmas Eve was two years I ſpent four hours with him; I converſed with him for three hours before I knew any thing was the matter with him; and upon aſking him a queſtion, reſpecting the matters he had mentioned before, concerning his ill treatment by Major Amherſt, and Enſign Steward in the Weſt-Indies; he declared then the reaſon he was ill-treated, was, that he wiſhed to reveal what the government wiſhed to conceal; for that he ſaw a cloud come down from Heaven, that it cemented into a rock, and out of that ſprang a falſe iſland of Jamaica; and becauſe he wiſhed to reveal it, he had, he ſaid, been confined one hundred and ſixty-three days; and they had taken different means; that he had taken an oath of this before Sir Sampſon Wright; a copy of which he gave me, and he wanted to have it publiſhed, but Woodfall, the printer, refuſed; and he ſaid, he hoped, that I, as one of his friends, would make it a converſation, in hopes it would reach the ears of the King; I thought that the ſpeech of a madman; and he ſaid, that he had wrote to the King and to Sir George Young, the Secretary of War, and could receive no redreſs, and that they had reduced him to half pay: I underſtood that a Gentleman of the name of Garrow was employed as his counſel, and I ſent the copy of this oath, encloſed in a letter to inform him of it. I laſt Chriſtmas-day, by chance, went into the ſame friend's houſe, at No 22, in Frith-ſtreet; where I drank tea with Mr. Frith; he then told me, he was worſe uſed than common, that he was perſecuted, and that they wanted to ſet him up as Anti-chriſt, or a fourth perſon in the Godhead,

head; and that he looked upon to be blaſphemy, or elſe he might have a good living; that and many other inſtances I can prove if neceſſary.

Queſ. Did you believe him to be in his ſenſes?

Mr. Fuller. No, upon my oath, and upon that one ſubject of his conceiving himſelf to be in his ſenſes, and ill-treated, and particularly by government. This happened about a month before the circumſtance for which he was taken up; there were four people more that heard it.

LORD KENYON.---Gentlemen of the Jury, the enquiry which you are now called upon is, not whether the priſoner was in this unfortunate ſtate of mind when the accident happened, nor is it neceſſary to diſcuſs or enquire at all what effect his preſent ſtate of mind may have, whenever that queſtion comes to be diſcuſſed; but the humanity of the law of England falling into that, which common humanity, without any written law, would ſuggeſt, has preſcribed, that no man ſhall be called upon to make his defence, at a time when his mind is in a ſituation not capable of ſo doing; for, however guilty he may be, the enquiry into his guilt muſt be poſtponed to that ſeaſon, when, by having his intellects entire, he ſhall be able ſo to model his defence, as to ward off the puniſhment of the law; it is for you, therefore, to enquire whether the priſoner is now in that ſtate of mind; and inaſmuch as artful men may put on falſe appearances, I think the counſel for the priſoner have judged extremely proper for your ſatisfaction and the publick's, not to ſuffer your judgment to proceed on that which he has now ſaid, though that is extremely pregnant with obſervation; but they have called witneſſes, and gone back to the earlier period of his life, and ſtated his condition of mind to you at the time the two letters were written, which you have heard: this ſeems to me to leave no doubt on any man's mind; therefore, the queſtion the Court propoſes to you now, is, Whether he is at this time in a ſane or an inſane ſtate of mind?

Priſoner. Permit me to ſpeak; the Phyſician is the moſt principal perſon, who has viſited me as a friend, he can tell more than from any other private perſon's declarations whatever. I appeal as a Britiſh ſubject.

Jury. My Lord, we are all of opinion that the priſoner is quite inſane.

Court. He muſt be remanded for the preſent.

Priſoner. Then I muſt call on that Phyſician, who ſaid, on the 19th, I was perfectly in my ſenſes.

The priſoner was then removed from the bar.

CROWN

CROWN CASES.

The KING *againſt* JUDD.

In the KING'S BENCH, HILARY TERM, 1788.

Henry Judd was committed to Hertford gaol, by a warrant under the hands and ſeals of eleven Juſtices of that county, on the oath of George Sworder and others, charging him "with giving two guineas to one Daniel Wright (which D. Wright ſtands convicted of a burglary in the dwelling-houſe of the ſaid George Sworder), to diſturb the dwelling-houſe of the ſaid George Sworder. And alſo--with giving to Nathaniel Rand, about a fortnight after harveſt laſt, a guinea and a half, to *keep on* with the ſaid George Sworder as the ſaid N. Rand had then begun; and to do him the ſaid George Sworder all the miſchief he could except killing him.---And for being acceſſary with the ſaid N. Rand, who was committed to Hertford gaol on the oaths of the ſaid George Sworder and others, as well as upon his own confeſſion, in wilfully and maliciouſly ſetting fire to a parcel of unthreſhed wheat, in the night, the property of the ſaid George Sworder; and which he the ſaid N. Rand hath confeſſed he did at the requeſt of the ſaid Henry Judd."

On Monday February 4, 1788, the priſoner was brought up to this Court from Hertford gaol by Habeas Corpus to be bailed; and his commitment being read, it was contended by Mr. Silveſter and Mr. Fielding for the priſoner, that the warrant contained no charge of felony, and therefore he was entitled to be bailed or diſcharged, by virtue of the ſtatute 31 *Car.* II. cap. 3.

Mr. Erſkine, Mr. Mingay, and Mr. Garrow, for the Crown, admitted that the firſt two charges in the warrant did not contain ſuch a deſcription of felony as would intitle them to expect that the priſoner ſhould be remanded; but that the third charge contained a full and ſufficient deſcription of an acceſſary *at common law* to the felony, created by the ſtatute 9 *Geo.* I. cap. 22, which enacts, "That if any perſon or perſons ſhall ſet fire to any houſe, barn, or outhouſe, or to any hovel, cock, mow, or ſtack of corn, ſtraw, hay, or wood; or ſhall by gift, or promiſe of money or other reward, procure any of his Majeſty's ſubjects to join him or them in any ſuch unlawful act, every perſon

ſo

ſo offending ſhall be guilty of felony, without benefit of clergy.

The priſoner's Counſel replied, that acceſſaries at the common law, unleſs there was a ſtrong preſumption of their guilt, ariſing from an indictment having been found againſt them, were entitled to be bailed; that the warrant only charged the principal "with wilfully and maliciouſly ſetting fire to a parcel of unthreſhed wheat;" and no ſuch offence was made felony by the ſtatute; and admitting it was an offence within the meaning of the ſtatute, yet the warrant would be defective, in not charging it to have been done *felonioufly*.

Mr. JUSTICE ASHHURST.---However improper the defendant's conduct appears to have been upon the proceedings before the Juſtices, yet unleſs it appears upon the face of the commitment itſelf that the defendant is charged with a felony, we are bound by the *Habeas Corpus Act* to diſcharge him; taking ſuch bail for his appearance to take his trial as we in our diſcretion ſhall think fit, according to the circumſtances of the caſe: the queſtion therefore is, Whether there is ſpecified in this commitment ſuch an offence as amounts to felony? It is admitted that neither of the firſt two charges amount to felony. The laſt charge is, that the defendant was an acceſſary with Rand in *wilfully* and *maliciouſly* ſetting fire to a *parcel* of unthreſhed wheat, without alledging that the offence was done *felonioufly:* and although it is not neceſſary that the word "*felonioufly*" ſhould be uſed in the commitment, yet it ought to appear on the facts ſtated to be in law a felony, and within the deſcription of the Act. Now the ſtatute has only made it felony to ſet fire to a *cock*, *mow*, or *ſtack of corn*, and the defendant is not charged with either of theſe. We muſt ſuppoſe, that the Legiſlature well knew the meaning of the words they have uſed, and if a Juſtice of the Peace uſes the ſame words, we are bound to ſuppoſe that he intended them in the ſame ſenſe; but if he makes uſe of other words, he muſt be more preciſe. Now here, a *parcel* of unthreſhed wheat is too looſe a deſcription. It does not come within the deſcription of the Act. We cannot ſay how much is meant by the word *parcel*. Twenty ears of wheat may be called a *parcel*; but can never be conſtrued either a *cock*, *mow*, or *ſtack*. I am therefore of opinion, that as the warrant of commitment does not charge the defendant with a felony, we are bound to bail him. With regard to the *quantum* of the bail, although the nature of the defendant's crime is not very accurately ſtarted, yet as ſufficient appears on the depoſitions returned with the commitment

mitment to ſhew that he has at leaſt been guilty of an enormous offence, I think we ought to take ample ſecurity for his appearance, and that he himſelf ſhould be bound in 1000l. and four ſureties in 500l. each.

Mr. JUSTICE GROSE.—It is not neceſſary that the act ſhould be charged in the warrant of commitment to be done *feloniceè*; it would be ſufficient, if on the facts ſtated we could not but ſee that the act was feloniouſly committed. If therefore a *parcel* of wheat *ex vi termini* deſcribed a *cock*, *mow*, or *ſtack* of corn, I ſhould be of opinion that a felony was ſufficiently charged in this commitment: but I think that it does not; for if in the act of removing a ſtack of corn from a farmer's yard to his barn, a ſmall parcel dropped by accident, the ſetting fire to that parcel would not be an offence within the Act of Parliament. As to the ſureties which we in our diſcretion ſhould require, I am of opinion, that the ſecurity mentioned by my brother *Aſhhurſt* ought to be given, ſince we cannot but ſee that the defendant has been guilty of a moſt atrocious act.

The defendant was bailed accordingly.

HICKMAN'S CASE.

The priſoner was tried before Mr. Juſtice Buller at the Old Bailey in July Seſſion, 1783, for a robbery upon John Miller.

The proſecutor was ſervant to Mr. Lewis, table-decker to the Chaplain's room in St. James's Palace, and had an apartment, in which he alone ſlept, in a court called the Board of Green Cloth. The priſoner was a centinel on guard at the Palace, and had been one night treated by the proſecutor with ſome bread and cheeſe and ale in this room. About a fortnight afterwards, very late in the evening of the day laid in the indictment, the proſecutor, on going up ſtairs, heard ſomebody ſtepping almoſt upon his heels. On turning round, he diſcovered it was the priſoner, who ſaid, "It is me." The proſecutor replied, "What brought you here at this time of the night?" The priſoner anſwered, "I am come for ſatisfaction; you know what paſſed the other night; you are a Sodomite; and if you do not give me ſatisfaction I will go and fetch a ſerjeant and a file of men, and take you before a Juſtice; for I have been in the Black Hole ever ſince I was

I was here laſt, and I do not value my life." The proſecutor aſked him what money he muſt have? The priſoner ſaid, "I muſt have three or four guineas." The proſecutor accordingly gave him two guineas, which was all he had, and promiſed to give him another guinea the next morning. The priſoner took the two guineas, ſaying, "Mind, I don't *demand* any thing of you." The next morning he came again, and received the other guinea; and in a few days after, upon making an application for more money upon the ſame pretence, he was apprehended. The proſecutor ſwore, that he was very much alarmed when he gave him the two guineas, and did not very well know what he did; but that he parted with his money under an idea of preſerving his character from reproach and not from the fear of perſonal violence.

The learned Judge ſtated to the Jury the ſeveral ingredients which the law required to conſtitute the crime of robbery; and particularly, as applicable to this ſpecies of it, the determination of the JUDGES in the caſe of *the King and Donnally*; remarking the difference, that in *Donnally's caſe* the proſecutor had ſworn, that he delivered his money under an apprehenſion of perſonal danger, as well as from the fear of loſing his character; but that, in the preſent caſe, the proſecutor had ſworn he parted with his money for the ſake of his character only, and not from any apprehenſion of danger to his perſon.

The Jury thought that the proſecutor parted with his money againſt his will, through a fear that his character might receive an injury from the priſoner's accuſation; and they therefore found the priſoner GUILTY. But as this was only the ſecond caſe of the kind, and as ſome doubt had prevailed with reſpect to *Donnally's caſe*, becauſe he was not executed, the judgment was reſpited, and the caſe ſubmitted to the conſideration of the TWELVE JUDGES, upon the difference before mentioned between the two caſes.

In February Seſſion, 1784, the priſoner was called to the bar, and Mr. Juſtice Aſhhurſt delivered the opinion of the Judges to the following effect:—Some doubts having been entertained as to the opinion of the TWELVE JUDGES in the caſe of *Patrick Donnally*, the learned Judge who tried the priſoner thought it proper that the preſent caſe ſhould likewiſe be referred to their conſideration. They have accordingly conferred upon it; and they are of opinion, That it does not *materially* differ from the caſe of *Donnally*; for that the true definition of ROBBERY is the ſtealing, or the ſtealing or taking from the perſon, or in the preſence of

all-

another, property of any amount, with ſuch a degree of *force* or *terror*, as to induce the party *unwillingly* to part with his property; and whether the terror ariſes from real or expected violence to the perſon, or from a ſenſe of injury to the character, the law makes no kind of difference; for to moſt men the idea of loſing their fame and reputation is equally, if not more terrific than the dread of perſonal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the JUDGES are unanimouſly of opinion, That upon the principles of law, and the authority of former deciſions, a *threat* to accuſe a man of having committed the greateſt of all crimes, is, as in the preſent caſe, a ſufficient *force* to conſtitute the crime of robbery by putting in fear.

The priſoner received ſentence of death, and was executed.

FISHER'S CASE.

Old Bailey, January Seſſion, 1785.

The priſoner was indicted, before Mr. Juſtice *Heath*, for burglariouſly breaking and entering the dwelling-houſe of Benjamin Ward, and ſtealing therein four gold watches of a conſiderable value; to which indictment he had pleaded *Not Guilty*.

The proſecutor proved that the burglary had been committed, and that the watches were ſtolen; but there was no evidence whatever to bring the charge home to the priſoner, except a confeſſion of the fact, which he had freely and voluntarily made before a Juſtice of the Peace on his examination, but it was not reduced into writing.

The COURT. It is an eſtabliſhed rule of law, that the mere confeſſion of a crime, without any one ſingle circumſtance to corroborate it, is not ſufficient to convict a priſoner, unleſs he ſhould again confeſs the fact, by pleading *Guilty* to the indictment.

GIB-

GIBSON, MUTTON *and* WIGGS'S CASE.

At the Surrey Lent Aſſizes, 1785, for Kingſton, the priſoners were convicted before Mr. BARON PERRYN, for burglary in the dwelling-houſe of T. S. and ſtealing goods therein, the property of John Hill.

It appeared in evidence, that there was a ſhop built cloſe and adjoining to the dwelling-houſe mentioned in the indictment; but there was no internal communication whatever between the houſe and ſhop, and no perſon ſlept in the ſhop. The only door to the ſhop was in the court-yard before the houſe and ſhop, which court-yard was incloſed by a brick wall three feet high. In the wall was a wicket which ſerved as a communication to both the houſe and ſhop. The burglary was committed in the ſhop. The *ſhop* was let by T. S. to John Hill, together with ſome apartments in the *dwelling-houſe*, from year to year, at ſix guineas *per annum*.

It was objected by the Counſel for the priſoner, that the ſhop could not be conſidered as any part of the dwelling-houſe of T. S. and upon this objection the judgment was reſpited, and the caſe reſerved for the opinion of the TWELVE JUDGES.

Mr. BARON EYRE, at the Summer Aſſizes for the ſame county at Croydon, 1785, ordered the priſoners to the bar; and informed them, that the JUDGES had conſidered of this caſe, and that they were unanimouſly of opinion it was a proper conviction.

The priſoners received ſentence of death, and were executed purſuant to ſuch ſentence.

Sessions Cases determined in the Court of King's Bench, subsequent to the Publication of the last Edition of Burn's Justice.

Young, Randal, Mullins, *and* Osmer, *v. the* King, *in Error.*

This was an indictment on the 30th *Geo.* II. cap. 24, for obtaining money on false pretences, removed by Writ of Error from the Sessions at Briſtol, where the defendants had been found guilty, and ſentenced to tranſportation for ſeven years.

The indictment ſtated, that the defendants did falſely pretend to W. Thomas, that John Young had made a bet of 500 guineas on each ſide with a Colonel of the Army then at Bath, "That W. Lewis would run on the high-road leading from Glouceſter to Briſtol ten miles within one hour;" and that Young and Mullins did go 200 guineas each in the ſaid bet, and Randal the other 100 guineas, and did, under colour and pretence of ſuch bet, obtain from Thomas, as a part of ſuch pretended bet, 20 guineas of the 500 guineas, with intent to cheat and defraud him thereof; whereas in truth and in fact no ſuch bet had been made, &c. A ſecond count ſtated that the defendants did falſely pretend to the ſaid Thomas that Young had made a bet of 500 guineas on each ſide with Oſmer, that Lewis would run, &c. as aforeſaid, by means of which falſe pretence the defendants did unlawfully obtain from Thomas the ſaid 20 guineas, with intent to cheat and defraud him of the ſame, &c. There were two other counts, charging the defendants with having obtained 20 guineas from Thomas by falſe pretences; without ſtating what thoſe pretences were. It was argued in objection to the indictment, 1ſt. That this tranſaction was not ſubject to criminal proſecution, as the falſe pretence muſt either be accompanied by ſome falſe token, or otherwiſe be of ſuch kind, as common prudence cannot guard againſt; 2dly, That this charge is not ſtated with ſufficient certainty, inaſmuch as the Colonel's name ſhould have been ſet forth; 3dly, The four defendants ſhould have been charged ſeverally, and the falſe pretence ex-

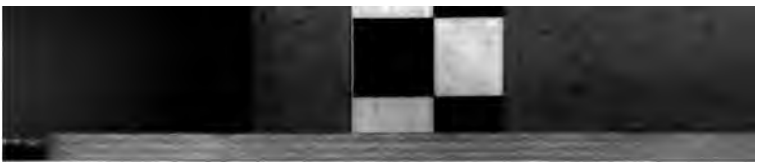
preſſed in words being a ſeparate act of the perſon uſing them; 4thly, The ſecond count of the indictment charges a diſtinct offence, namely, a pretended bet with Oſmer, and ſhould have therefore been a ſeparate indictment.

LORD KENYON, C. J.—This indictment being founded on the ſtatute of 30 *Geo.* II. cap. 24. is different from a common law indictment. When it paſſed, it was conſidered to extend to every caſe where a party had obtained money by falſely repreſenting himſelf to be in a ſituation in which he was not, or any occurrence that had not happened, to which perſons of ordinary caution might give credit. The ſtatute of the 33d *Hen.* VIII. cap. 1, requires a falſe ſeal, or token, to be uſed in order to bring the perſon impoſed upon into the confidence of the other; but that being found to be inſufficient, the ſtatute 30 *Geo.* II. cap. 24. introduced another offence, deſcribing it in terms extremely general. It ſeems difficult to draw the line, and to ſay to what caſes this ſtatute ſhall extend; and therefore we muſt ſee whether each particular caſe, as it ariſes, comes within it. In the preſent caſe four men came to the proſecutor, repreſenting a caſe as about to take place, that William Lewis ſhould go a certain diſtance within a limited time; that they had betted upon the event, and they ſhould probably win: he was perhaps too credulous, and gave confidence to them, and advanced his money; and afterwards the whole ſtory proved to be an abſolute fiction. Then the defendants, morally ſpeaking, have been guilty of an offence. I admit that there are certain irregularities which are not the ſubject of criminal law. But when the criminal law happens to be auxiliary to the law of morality, I do not feel any inclination to explain it away. Now this offence is within the words of the act; for the defendants have, by falſe pretences, fraudulently contrived to obtain money from the proſecutor; and I ſee no reaſon why it ſhould not be held to be within the meaning of the ſtatute. The ſecond objection is, that the charge is imperfectly ſtated; but that is anſwered by the record. If the indictment did not inform the defendants what charge they were called upon to anſwer, the objection would be well founded. But it holds out to them ſufficient intelligence of the offence imputed to them. It ſtates the wager to be with "a Colonel at *Bath*;" perhaps his name was not mentioned, ſo that he could not have been deſcribed in the indictment with greater accuracy. But if ſuch a wager had been actually depending, it was competent to the defendants to have proved it in their *defence*. *As to the* 3d objection: this caſe is extremely different

ferent from that of perjury, to which it has been compared; becauſe that depends on the very words which the perſon charged, individually uſes in a Court of Juſtice: and the words ſpoken by one cannot poſſibly be applied to another as falſely uttering thoſe very words. I do not ſee how that could ever have been doubted. But in this caſe all the defendants went together to the proſecutor, and thus carried a greater degree of credit; and they all joined in the relation as of a thing within their own knowledge. If they were all preſent, each acting a different part in the ſame tranſaction, no rule of criminal proceeding will be violated by adjudging them guilty of the impoſition *jointly*. I admit that offences are not to be charged in ſuch a manner as will confound the evidence: but in caſes where it is neceſſary that ſeveral defendants ſhould be indicted jointly, and the evidence is complicated, it may be ſeparated for each particular defendant, as was done in the caſe before Mr. Juſtice *Yates* at Hereford, in the trial of Mr. Powell's murderers. The fourth objection would be well founded, if the legal judgment on each count was different; it would be like a misjoinder in civil actions. But in this caſe the judgment on all the counts is preciſely the ſame; a miſdemeanor is charged in each. Moſt probably the charges were meant to meet the ſame facts: but if it were not ſo, I think they may be joined in the ſame indictment.

ASHHURST, J.—As to the firſt objection: caſes which happened before the paſſing of the 30th *Geo.* II. cap. 24, do not apply to this. For that ſtatute created an offence which did not exiſt before, and I think it includes the preſent. The Legiſlature ſaw that all men were not equally prudent, and this ſtatute was paſſed to protect the weaker part of mankind. The words of it are very general, "all perſons who knowingly by falſe pretences ſhall obtain from any perſon money, goods, &c. with intent to cheat or defraud, &c." and we have no power to reſtrain their operation. With reſpect to the ſecond objection; it ſeems that the charge is as certain as the nature of the thing would admit. The third objection would have been much ſtronger, if the charge had been laid as ſeveral; for if they all acted together, and ſhared in the ſame tranſaction, it could not have been ſaid that one received the whole ſum. Neither is there any foundation for the laſt objection. Perhaps each count related to the ſame fraud, though it is charged differently. But if it were not ſo, I do not know any rule of law which prevents the joinder of two miſdemeanors in the ſame indictment.

BULLER, J.—The firſt objection is the one deſerving the moſt conſideration. The principles of the common law have been truly ſtated. To make an offence indictable at common law, it muſt be public in it's nature. And the diſtinction, which has been taken in the caſe of uſing falſe weights and meaſures, ſhews it more clearly than any other. If a perſon ſell by falſe weights, though only to one perſon, it is an indictable offence: but if without falſe weights he ſell to many perſons a leſs quantity than he pretends to do, it is not indictable. But though the common law, as applicable to this ſubject, is as ſtated by the counſel, it is in this caſe neceſſary to conſider both the ſtatutes 33 *Hen.* VIII. cap. 1, and the 30 *Geo.* II. cap. 24. By the former of thoſe the offence conſiſts in obtaining money or goods by *falſe tokens*; and unleſs ſome token be uſed, the caſe does not come within that act. Now ſuppoſe a token had been produced in this caſe, and that the defendants, after telling their ſtory to the proſecutor, had ſaid, "If you have any doubt, here is the Colonel's gorget;" I think it would have fallen within the ſtatute of 33 *Hen.* VIII. If it would, then let us conſider what effect the 30 *Geo.* II. cap. 24, has on the caſe. The Legiſlature thought that the former ſtatute was too limited; and therefore the 30 *Geo.* II. cap. 24, was paſſed, which enacts that all perſons, who ſhall obtain money from others by *falſe pretences* with intent to cheat or defraud ſuch perſons, ſhall *be deemed offenders againſt the public peace.* The ſtatute therefore clearly extends to caſes which were not the ſubject of an indictment at common law. The ingredients of this offence are the obtaining money by falſe pretences, and with an intent to defraud. Barely aſking another for a ſum of money is not ſufficient, but ſome pretence muſt be uſed, and that pretence falſe; and the intent is neceſſary to conſtitute the crime. If the intent be made out, and the falſe pretence uſed in order to effect it, it brings the caſe within this ſtatute. Very few caſes on this Act of Parliament have been brought before this Court: but there was an indictment on this ſtatute againſt Count Villeneuve, tried at Cheſter in the year 1778, which I have had occaſion to mention here ſeveral times, and which I have never heard doubted or contradicted. That indictment was tried while I ſat with Moreton, C. J. on the bench of Cheſter, of whom all who remember him will bear teſtimony with me that he was a very able judge, and peculiarly cautious in criminal caſes. The facts of that caſe were ſhortly theſe: the defendant applied to Sir T. Broughton, telling him that he was intruſted by the Duke de Lauzun to take ſome horſes from



from Ireland to London, and that he had been detained ſo long by contrary winds that his money was ſpent; Sir T. Broughton was induced by this repreſentation to advance ſome money to him; afterwards it turned out that the priſoner never had been employed by the Duke de Lauzun, and his whole ſtory was a fiction. On that caſe the priſoner was convicted, and ſentenced to hard labour on the Thames. Now that caſe goes the full length of deciding this. As to three other objections, they admit of very eaſy anſwers. With reſpect to the objection that the charge is too general: in this ſtage of the proceeding, the Court muſt take it that the repreſentation was made by the defendants in the ſame manner that it is charged in the indictment. And if that, though general, was ſufficient to anſwer the defendant's purpoſe, we cannot ſay that it was too general. We are not to ſuppoſe that the Colonel's name was mentioned; and the proſecutor could not ſtate it with greater particularity than the defendants uſed. The third objection is that this is not a joint offence: but, as this is the caſe of a miſdemeanor, the caſe in Burrow, 984, is a deciſive anſwer to it; there Lord Mansfield ſaid, "it is a ſtrange thing if the king cannot call a man to account for a breach of the peace, becauſe he broke two heads inſtead of one." The preſent was, I think, a joint offence; it was a joint repreſentation to anſwer one and the ſame purpoſe; neither is the proof ſeveral; it relates to one tranſaction. This is not like the caſe of a conſpiracy, where the whole ſtory muſt be taken up in detached pieces at different times to charge the different actors. But here it is one entire act, which they were all carrying on in concert together. If however any authority were neceſſary, a caſe happened about a year ago which is ſtronger than the preſent. Three perſons were indicted on the Black-Act for ſhooting at the proſecutor; they were all charged with the ſingle act, and the indictment was held by all the Judges of England to be ſufficient. As to the remaining objection: that is founded on a point which once embarraſſed me a great deal. Some years have elapſed ſince I looked into it, but I believe I can ſtate pretty accurately how it ſtands. In miſdemeanors the caſe in Burrow ſhews that it is no objection to an indictment that it contains ſeveral charges. The caſe of felonies admits of a different conſideration; but even in ſuch caſes it is no objection in this ſtage of the proſecution. On the face of an indictment every count imports to be for a different offence, and is charged as at different times. And it does not appear on the record whether the offences are or are

not



not diſtinct. But if it appear before the defendant has pleaded, or the Jury are charged, that he is to be tried for ſeparate offences, it has been the practice of the Judges to quaſh the indictments, leſt it ſhould confound the priſoner in his defence, or prejudice him in his challenge of the Jury; for he might object to a juryman's trying one of the offences, though he might have no reaſon to do ſo in the other. But theſe are only matters of prudence and diſcretion. If the judge, who tries the priſoner, does not diſcover it in time, I think he may put the proſecutor to make his election on which charge he will proceed. I did it at the laſt Seſſions at the Old Bailey, and hope that, in exerciſing that diſcretion, I did not infringe on any rule of law or juſtice. But if the caſe has gone to the length of a verdict, it is no objection in arreſt of judgment. If it were, it would overturn every indictment which contains ſeveral counts. So where the evidence affects ſeveral priſoners differently, I have, as was done by Mr. J. Yates at Hereford, ſelected the evidence as applicable to each, and left their caſes ſeparately to the Jury. And in a caſe which happened before me on the laſt Spring Aſſizes at Exeter, where two priſoners were indicted for murder, and evidence given which preſſed very hard on one priſoner, but was not admiſſible againſt the other, I thought it the ſoundeſt way of adminiſtering juſtice to ſum up the evidence, and take the verdict againſt each ſeparately. But all theſe are mere matters of diſcretion only, which Judges exerciſe in order to give a priſoner a fair trial: for when a verdict is given, they are not the ſubject of any objection to the record.

GROSE, J.—My brother *Buller* has given a deciſive anſwer to the firſt objection. The ſtatute created a new offence; for it declares that all perſons obtaining money by falſe pretences, with an intent to cheat, ſhall be deemed offenders *againſt law* and the public peace. That particular offence is made an offence againſt law, whether it was ſo or not before. And I am clearly of opinion that this caſe comes within the Act of Parliament. As to the ſecond objection; it muſt be taken after verdict that the offence was proved as it was laid in the indictment; and if ſo, it could not have been charged in any other way. It is perfectly immaterial whether the name of the Colonel at Bath was or was not mentioned, ſince the defendants obtained the proſecutor's money by this repreſentation. With reſpect to the defendants being charged jointly; every crime which may be in its nature joint may be ſo laid. Here it is ſtated that all the defendants committed this offence, by all joining in the ſame plan;

plan: they were all jointly concerned in defrauding the profecutor of his money. And the offence being joint in its nature, it could not be laid with ſo much propriety in any other manner. On the laſt objection, I am clearly of opinion that it is no objection in arreſt of judgment that the indictment charges ſeveral offences. The different counts in the indictment always ſtate the offences as ſeparate: and if this objection were to prevail, every indictment which contains two counts muſt be bad. It is no objection even in the caſe of felonies; ſtill leſs is it ſo in miſdemeanours.

Judgment affirmed.

REX v. *Inhabitants of* GWENOP.

George Treverton and family were removed from Penryn to Gwenop; and the Seſſions, upon appeal, confirmed the Order of Removal.

CASE.

George Treverton was a married man, and had a family, and had been drawn to ſerve in the militia within the ſaid county in 1778, and was duly ſworn and ſerved his full three years in actual ſervice in the ſaid militia; and at the end of that time was diſcharged. His occupation was that of a huſbandman, working at daily wages for the ſupport of himſelf and family: his reſidence had been for ſome years laſt paſt in Penryn, and he had never been chargeable thereto; and his laſt legal ſettlement was in Gwenop. He therefore inſiſted that, having ſerved the ſaid three years in the militia, he was entitled to the privilege and benefit granted to militia-men under the act of the 26 *Geo.* III. cap. 107, and the other ſtatutes in that caſe made, and was therefore irremoveable; but the Seſſions conſidered that his was not a trade within the meaning of the ſtatutes.

ASHHURST, J.—This caſe ſeems to be extremely clear both on the words and the meaning of the Act of Parliament. The firſt Act of Parliament on this ſubject is the 22. *Geo.* II. cap. 44, which is confined to mariners and ſoldiers: and the preamble of it ſtates that mariners and ſoldiers of different trades, and apprentices who had not ſerved their time, were prohibited from ſetting up their trades in corporate towns, &c. either by reaſon of bye-laws therein made;

made; or of the 5th *Eliz.* cap. 4. Now that was the inconvenience intended to be remedied; for which purpoſe it was enacted, that all ſuch mariners and ſoldiers might ſet up their trades in any town, notwithſtanding thoſe diſabilities. This therefore was a proper indulgence given to thoſe perſons who were taken out of their buſineſs in order to enter into his Majeſty's ſervice. And it is obſervable, that the ſtatute 26 *Geo.* III. cap. 107, upon which this queſtion ariſes has an expreſs reference to the former one; and therefore we muſt ſuppoſe that the Legiſlature had in view the ſame inconveniences which were intended to be remedied by the 22 *Geo.* II. And this latter act ſays, that every perſon having ſerved in the militia, &c. may ſet up any trade as freely and with the ſame proviſions, and under the ſame regulations, as any mariner or ſoldier could do by virtue of the 22d *Geo.* II. And that *no ſuch* miiitia-man ſhall be liable to be removed, &c. This act being made in *pari materiâ* with the 22 *Geo.* II. and expreſsly referring to it, may be conſidered as incorporated with it; and that relates to *perſons in trade*, but not to common labourers, who would not ſuffer the ſame inconveniencies as the former, for they might eaſily find employment wherever they might happen to be.

BULLER, J.—If the Legiſlature had uſed any words giving theſe privileges generally to all militia-men, I ſhould not have been inclined to confine the operation of them; being of opinion, that it would be the wiſeſt law that could be made on this ſubject, that no perſon ſhould be removed till he is actually chargeable. But as the Legiſlature has not ſaid ſo, we cannot make the law. The firſt argument is, that every militia-man, who has actually ſerved and is married, is entitled to two privileges: but that is doing great violence to the words; for then we muſt ſuppoſe that two-thirds of this clauſe in the act have no meaning. But in conſidering the deſcription of the perſons intended to be benefited, every part of the clauſe muſt be attended to. For the privilege given in the firſt part of the ſection is, that ſuch a militia-man may ſet up any trade in any town, &c. as freely, and with the ſame proviſions, and under the ſame regulations, as any mariner or ſoldier can do by virtue of the 22 *Geo.* II. entituled, "An Act to enable ſuch officers, &c. *to exerciſe trades*:" then this ſtatute goes on to ſay that no *ſuch* militia-man ſhall be liable to be removed out of *ſuch* town. The word "ſuch" is material in both theſe places. The firſt means *ſuch* perſons as have ſerved, are married, and have ſet up trades; the other refers to the town where they are to exerciſe the trades. I agree that a militia-man who



who has ſerved, &c. cannot be removed before he has ſet up the trade, if he go there for that purpoſe; for he, who is privileged *morandi*, is privileged *eundo*. This queſtion therefore is extremely clear on this Act of the 26 *Geo* III. cap. 107. But if it be coupled with the 22 *Geo.* II. cap. 44. no doubt whatever can be entertained about it; for that is expreſsly confined to perſons exerciſing trades. The object of that Act was to protect ſoldiers &c. againſt the 5th of *Eliz.* cap. 4, and certain bye-laws in particular towns: but a labourer is not a trader within the ſtatute of *Elizabeth*. The argument drawn from the 24th *Geo.* III. bears againſt the point for which it was mentioned: for if the words of this ſtatute 26th *Geo.* III. be doubtful, reference muſt be made to the 24th *Geo.* III. cap. 6, as they are made in *pari materiâ*; and by that it appears, that the ſoldiers, &c. are only irremoveable *during the time they exerciſe any trades*.

GROSE, J.---It is inſiſted, that a labourer is entitled to the privilege of being irremoveable until he become chargeable, if he has ſerved in the militia and is a married man. But if we read the titles and preambles of the three ſtatutes, which are made in *pari materiâ*, there can be no doubt in this queſtion. For they were paſſed to enable perſons, who have ſerved their country, to ſet up trades, which they could not do without incurring the penalties of the 5th of *Eliz* cap. 4, and of bye-laws in certain towns. And my conſtruction of this laſt act, which has an expreſs reference to the 22d *Geo.* III. cap. 44, is that all militia-men who have actually ſerved, and are married, may exerciſe any trade in any town notwithſtanding thoſe bye-laws, and the 5th of *Elizabeth*. If this were not the intention of the Legiſlature, they would have ſaid that, "all militia-men who have ſerved and are married, going into any town, &c. ſhall be irremoveable." But thoſe are not the words of the ſtatute. Therefore I have no doubt but this pauper was removeable, and that the order of ſeſſions muſt be confirmed.

Order of Seſſions confirmed.

The KING *v. the Inhabitants of* HAMSTALL RIDWARE.

CASE.

Ann Cradock, being ſettled at Rudgley, was bound as a pariſh-apprentice to Suſannah Cotton, of the ſame place; who aſſigned her to S. Walker, of Hamſtall Ridware, with whom ſhe reſided there under the indenture more than 40 days, till the time of his death, when ſhe was removed by order of two Juſtices from Hamſtall Ridware to Rudgley. The indenture was aſſented to by two Juſtices of the Peace by ſigning the ſame *ſeparately*; but the two Juſtices *did not aſſent to or ſign the ſame at the ſame time*, or in the preſence of each other. The ſeſſions, on appeal, quaſhed the order.

LORD KENYON, C. J.---Perhaps the rule, requiring the concurrence of two Magiſtrates at the ſame time, may be ſometimes attended with inconvenience. But the rule has been long ſettled to be, that the concurrence of Juſtices together is not neceſſary where the act to be done is merely *miniſterial*; but they muſt confer together and form a joint opinion, where the act is of a *judicial* nature. It has been held (whether rightly ſo or not we are not now to enquire) that the allowance of a poor-rate is an act merely *miniſterial*; and, that being once eſtabliſhed, the conſequence reſults that the two magiſtrates need not meet when they allow the rate. The words indeed of the ſection on which this queſtion ariſes are nearly ſimilar to thoſe uſed in the firſt, under which the poor-rate is to be allowed: but when the nature of this caſe is conſidered, it appears to be one of the moſt ſerious ſubjects that fall within the deciſions of the Juſtices. For they are empowered by this Act of Parliament to take children out of the arms of their parents, and to bind them out as apprentices till they are 21 years of age. The law has made them the guardians for thoſe children, who have no others to take care of them. And who ought to judge of the fitneſs of the perſons, to whom the poor children are thus to be apprenticed? Not the overſeers——they are frequently obſcure people, and perhaps in managing the buſineſs of the pariſh are not always attentive to the feelings of parents. But the Legiſlature intended that the Magiſtrates ſhould have a check and control over the pariſh officers in this inſtance; and in my mind they are called upon

to

to examine, with the moſt minute and anxious attention, the ſituations of the maſters, to whom the apprentices are to be bound, and to exerciſe their judgment ſolemnly and ſoberly before they allow or diſallow the act of the pariſh-officers; for which purpoſe it is neceſſary that they ſhould confer together.

ASHHURST, J.—The act of the Juſtices in this caſe is in its nature an act of judgment. They are the guardians of the morals of the people, and ought to take care that the apprentices are not placed with maſters who may corrupt their morals. The Juſtices therefore ſhould enquire particularly whether or not they ought to allow the binding by the pariſh-officers; and I think they would be guilty of a breach of duty, if they implicitly gave their aſſent without examining into the circumſtances of the caſe.

BULLER, J.—It is not eaſily to be reconciled with any principle of common ſenſe to ſay that an act, which is merely *miniſterial, muſt be done with the conſent of two Juſtices.* And I much doubt whether the perſons who brought in the act, (43 *Eliz.* cap. 2.) requiring the conſent of two Magiſtrates to the allowance of a poor-rate, intended that the act of allowing it ſhould be only miniſterial; for it ſeems abſurd to require the aſſent of two Juſtices, and yet not to give them the power of withholding it, if they ſee occaſion. But the Legiſlature has not given them any authority to exerciſe their judgment upon that ſubject; and therefore this Court has ſaid, on the conſtruction of that ſtatute, that their allowance of the rate is merely miniſterial. But the act of aſſenting to the binding of pariſh-apprentices is purely *judicial*; for, on appeal, the Juſtices at the Seſſions are not only to conſider the propriety of binding out the apprentice, but alſo whether the maſter be bound to take him.

GROSE, J.—This act is peculiarly of a judicial nature; for the Magiſtrates are oppointed the guardians of thoſe who have no other guardians. They ſhould therefore exerciſe their judgment in this caſe with great deliberation.

Order of Seſſions quaſhed.

The

The KING *v. the Inhabitants of* ALLENDALE.

Driſdale and wife were removed by order of two Juſtices from Lambley to Allendale, in Northumberland; Seſſions on appeal confirmed the order.

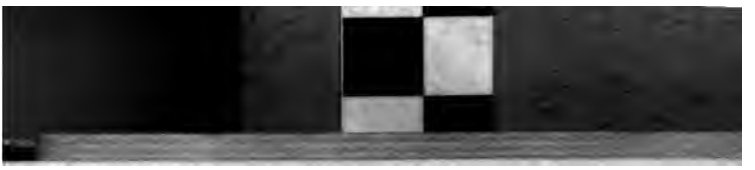
CASE.

In February, 1786, the pauper, John Driſdale, being *then an unmarried man*, not having child or children, was hired for a year to ſerve Thomas Benſon, at Allendale, from May-day, 1786, to May-day, 1787, as a hind. It is the cuſtom in that country to hire married men, as hinds, becauſe their wives are bound to perform certain ſervices for the maſter in time of harveſt; and when the wife of a hind dies, he muſt hire a female ſervant to perform ſuch ſervices. It was in the contemplation of both the maſter and the ſervant, and perfectly underſtood by them, at the time of hiring, that the pauper would marry before he entered upon his ſervice. After ſuch hiring, and before the commencement of the ſervice, he married his wife, the other pauper, *and entered upon his ſervice a married man*, and ſerved out the whole year a married man at Allendale.

BULLER, J.—Neither the cuſtom of the country, nor the agreement between the parties, went to compel this pauper to marry before he entered upon his ſervice; he was at liberty to do ſo or not as he pleaſed. The cuſtom of the country only amounts to this, that part of the ſervice is to be performed by a female: it is therefore indifferent to the maſter whether the ſervant be married or not, becauſe, if he be ſingle, he muſt hire ſome female to perform thoſe ſervices. As to the caſe put at the bar, of a contract at an unreaſonable diſtance of time before the ſervice is to commence, that would be ſtrong evidence of fraud. So if this pauper had been under an agreement to marry, and the maſter had told him that he ſhould not marry for a month in order to evade the ſtatute, that alſo might be conſidered as fraudulent. But there is no pretence to ſay that there is any fraud in this caſe.

Both orders affirmed.

The



The KING, *v.* JOHN CLAPP.

The overſeers of Sowton in Devon, apprenticed a pauper, with conſent of two Juſtices, to the defendant. The defendant appealed to the Seſſions, who confirmed the act of the Juſtices, ſubject to the opinion of the Court.

CASE:

The pauper was bound to the defendant, who reſided in the pariſh of Pinhoe, and occupied an eſtate in the pariſh of Sowton, of the value of 20l. *per ann.* upon which there was no houſe, but which was divided from the defendant's dwelling-houſe by the highway. The apprentice was tendered with the indenture to the defendant in the highway adjoining to the eſtate in Sowton.

LORD KENYON, C. J.—It is highly fit that this queſtion ſhould not remain any longer undecided. I remember a much older caſe than either of thoſe mentioned at the bar, in which this queſtion was diſcuſſed, but not decided. The queſtion ariſes on the 5th ſection of the 43 *Eliz.* cap. 2. The general purview of that ſtatute was to make a proviſion for the maintenance of the poor; and the firſt clauſe, in mentioning thoſe who are to contribute to ſuch maintenance, deſcribes two ſorts of perſons, namely, *inhabitants* and *occupiers of lands*, &c. Amongſt other proviſions for the poor, the 5th ſection gives power to the pariſh-officers, with the aſſent of two Magiſtrates, to bind poor children apprentices *where they ſhall ſee convenient*. It is true, indeed, that thoſe words cannot be taken ſo generally as they purport, becauſe they cannot compel mere ſtrangers, who ſtand in no relation to the pariſh, to take ſuch apprentices. But I think that the context of the ſtatute furniſhes the means of circumſcribing the general extent of thoſe words: and that context I take from the firſt clauſe, which impoſes other burdens of the ſame nature on *occupiers of lands*, &c. as well as inhabitants. The general object of the act was to compel all thoſe, who had any property in the pariſh, to contribute their due proportion towards the maintenance of the poor; and the receiving apprentices is one mode of contributing to their general relief. In conſtruing theſe words, I ſee no reaſon for confining the power of binding on the *inhabitants* of the pariſh; they ought to be extended to perſons

ſons *occupying lands in the pariſh, though reſiding out of it.* Then it is ſaid that if this conſtruction be put upon the ſtatute, the party may be doubly charged; in the pariſh in which he lives in reſpect of his inhabitancy; in that, in which he has lands, in reſpect of his occupation of them. But if he find himſelf aggrieved, he may appeal to the Seſſions; and we muſt take it for granted that the Juſtices will do what is right. They are to adapt the charge to the ſize of the property which the perſon charged poſſeſſes: and theſe are incidental charges which fall on him in reſpect of that property. I remember it was argued in a former caſe on this ſubject that, if this conſtruction of the ſtatute were to prevail, ſome pariſhes would diſburthen themſelves of many of their poor by apprenticing out their poor children to perſons living out of the pariſh: but the anſwer to any ſuch argument is, that at the time when the 43 *Eliz.* was paſſed, the ſtatute 13 & 14 *Car.* II. was not in exiſtence. However the ground of my deciſion here is, that this is one of the modes provided for the maintenance of the poor in this ſtatute, which impoſes the duty in reſpect of the property.

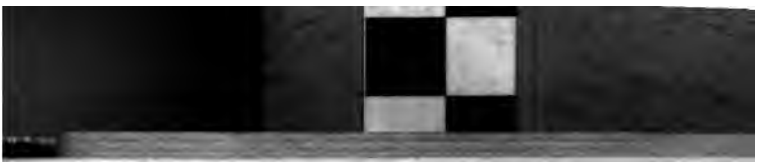
Order of Seſſions confirmed.

The KING *v. the Inhabitants of* LIVERPOOL.

Two Juſtices removed Samuel Littlemore, his wife, and four children, from Liverpool, in the county Palatine of Lancaſter, to Stourton in the county Palatine of Cheſter. The Seſſions, on appeal, reverſed that order, ſubject to the opinion of this Court.

CASE.

The pauper, Samuel Littlemore, was originally ſettled in Stourton, and about 16 years ago came to reſide in Liverpool; and while he reſided there, he was elected ſexton by the proprietors of the ſeats in the church or chapel of St. James's at a veſtry there held in the preſence of the churchwardens, being recommended by the then miniſter to that office; and executed that office ſix years, lodging all the while in the pariſh of Liverpool. The boundary between Walton and Liverpool is in the chapel yard of St. James's church, and part of the church-yard, ſtands in the pariſh of Walton, and the other part of the church-yard is in the



the parish of Liverpool: but not any corpse was ever buried in that part of the church-yard which lies in the parish of Liverpool, whilst the pauper executed the office, though corpses have been buried there since. The inhabitants of Liverpool, seat-holders and others, constantly attend the church of St. James's, in proportion of fifty to one of any other parish or place.

LORD KENYON, C. J.—There is no doubt but that part of the office of sexton consists in digging graves: this is different from that of the sacrist, which is an office scarcely known since the Reformation, except in some of the cathedrals; whose duty it is to take care of the sacred vestments. And it is as clear that the office of sexton is a public office within the meaning of the 3d of *W. & M.* cap. 11. § 6. In this case the church-yard lies in two parishes, and the sexton gained a settlement in that in which he resided.

Per Curiam, Order of Sessions confirmed.

The KING *v. the Inhabitants of* WITTON *cum* TWAMBROOKES.

A motion was made for a rule to set aside an order of Sessions, on the following

CASE.

The pauper's father rented a tenement of 16 l. a year in Witton, Chester, and resided upon it above a year, when the pauper was about six years old. He then went to Middlewick, where he did no act to gain a settlement, and two years after ran away from his family; and the pauper's mother, taking the pauper with her to Congleton, died in half a year, when the pauper was left in the care of one Jane Brookes, with whom he lived at Congleton, and worked at the silk mills there. The overseers of the poor of Witton paid the whole or a part of his maintenance for four years to Jane Brookes, after which period the pauper supported himself till the age of 16; at which time he got 3s. 9d. per week, and boarded himself where he liked. During the time he lived pauper at Congleton, he saw his father twice at the distance of about four years, at which times his father did not give him any thing (except a pair of breeches, and

two-



two-pence-halfpenny, and afterwards three halfpence). At 18 or 19 years of age, the pauper went from Congleton to Sheffield, and hired himself for four years, by which hiring, however, he gained no ſettlement. He heard that his father had been to enquire after him at Congleton, and that he then lived at Dunham, to which place the pauper went to ſee him, and was at that time 23 years of age, and married. It appeared that the father had made ſuch enquiry as abovementioned after the pauper from his daughter (the pauper's ſiſter) with intent as he ſaid to give him a ſuit of cloaths, as he had done leſs for the pauper than any of his children. It appeared that the father had married a ſecond wife, and held a tenement in Dunham of 11 l. a year, and had lived upon it eight years when his ſon went to ſee him there as above; upon which viſit he ſtaid only one hour, and never ſaw his father at any time but as above. Upon the above facts the Juſtices at the Cheſter Seſſions were of opinion that the ſettlement of the pauper George Hewit was at Witton, that place appearing to them the laſt ſettlement the pauper's father had whilſt the pauper remained a part of his family: and they confirmed an order of two Juſtices, by which the pauper, and his wife, and family, were removed from Stockport to Witton.

It was argued in ſupport of the order of Seſſions, that the pauper was emancipated, becauſe his father had no *domicile*, of which the pauper could be a member, after he was 8 years of age.

LORD KENYON, C. J.---It was never conceived in any caſe that a ſon, who was only 16 years of age, and who had not gained any ſettlement in his own right, was not part of his father's family. The caſes of emancipation have always been decided on the circumſtances either of the ſon's being 21, or married, or having gained a ſettlement in his own right, or (as in the caſe of the ſoldier) having contracted a relation which was inconſiſtent with the idea of his being in a ſubordinate ſituation in his father's family.

BULLER, J.—Here the pauper remained under the power of his father the whole time.

Per curiam. Rule abſolute; order of Seſſions quaſhed.

The

The KING, *v.* T. CARLYON, *Clerk, and Another.*

Upon an appeal to the Quarter-Seſſions of Cornwall, againſt a rate for the poor, they confirmed the rate, ſubject to the opinion of the COURT.

CASE,

The appellants were the proprietors of the tithe-ſheaf of the pariſh of Paul, and alſo of one-tenth of all fiſh taken within the pariſh: and that they and their tenants were rated as follows:

	£.	s.	d.
The Rev. Thomas Carlyon and Mrs. Veale, the rectorial tithe of pilchards - -	0	19	10½
Edward Paddy (who was a tenant to the appellants) for the tithe of the hook-fiſh, and all other fiſh, except pilchards and herrings, in the village of Newlyn, which lies in the pariſh of Paul - - - - -	0	5	3½
Benjamin Harry, Richard Wright and Co. who were alſo tenants of the appellants for the tithe of hook-fiſh, and all other fiſh (except pilchards and herrings) in Mouſhole, alſo within the ſaid pariſh - - -	0	2	4
John Glaſſon (who was alſo tenant to the appellants) for the tithe of ſheaf - -	0	5	10

The queſtion was the rateability of this property; and it having been always rated in this pariſh, and being a property *yielding a certain annual profit*, the Seſſions were of opinion that it was rateable.

LORD KENYON, C. J.—This queſtion is decided by the expreſs terms of the Act of Parliament; which after mentioning parſons and vicars, in the number of the perſons who are to contribute to the relief of the poor, enumerates (among other things) *tithes impropriate*, and *propriations of tithes*, in reſpect of which the rate is to be made. And indeed the ſpirit of the law coincides with the words of this ſtatute. For the Legiſlature intended that, when rates are made for the relief of the poor, every perſon ſhould contribute according to the benefit which he receives within the pariſh. Here the parties receive a certain benefit ariſing

from the tithe of fish in this parish, and run no risk whatever. Then it is said that only property, which is *visible*, should be rated: but I think that is carrying the rule of exemption too far; for oblations and other offerings, which constitute the rectorial or vicarial dues, are rateable.

BULLER, J.—Supposing the fishermen are not rateable, for the fish caught, the case of *Rowls* v. *Gells*, Cowp. 451, governs this. For though the owner of lead mines is not liable to be rated for them, yet his lessee, who runs no risk, is rateable in respect of the profits arising from *lot* and *cope*. So here the persons entitled to the tithe of fish run no risk, and their profit is certain: therefore, for that certain profit I think they are liable to contribute to the poor-rates.

Order of Sessions confirmed.

The KING *v.* WEBSTER.

This was an application for an information against the defendant, who was a Justice of the Peace for Devon, for having improperly convicted a person for killing a hare; which conviction was afterwards quashed at the Sessions.

Without going into the merits, it was contended against the rule, that the party convicted, before he applied for an information, should have made an exculpatory affidavit, denying the fact of which he had been charged.

LORD KENYON, C. J.—The question is not whether the doors of justice shall be stopped, but whether justice shall be approached by this particular avenue. If the defendant has acted improperly, however guilty the party applying might be of the charge which was imputed to him, there are other ways open to him for redress. But we cannot interfere in this particular manner, according to the established rules of the Court, without an affidavit, from the party complaining, that he is innocent of the fact with which he was charged. I remember an application of this sort made many years ago against Sir John Fielding, for having issued a warrant against one Bernard, upon a charge against him [not upon oath] by the Duke of Marlborough for sending threatening letters to extort money from the Duke. But the information was denied for want of such an exculpatory affidavit from Bernard.

ASHHURST, J.—said the Court had frequently required exculpatory affidavits from persons who applied for informations

mations for libels, and had refuſed to interfere becauſe they were not made. Thoſe caſes, he thought, could not be diſtinguiſhed from the preſent on principle, becauſe the Court did not interfere on account of the individuals concerned, but for a breach of the public peace.

Rule diſcharged.

The KING *v. the Inhabitants of* UFTON.

John Henwood, his wife, and three children, were removed from Ufton, Berks, to Mortimer, Southampton: and the Seſſions diſcharged the order of removal, ſubject to the opinion of the Court on the following

CASE.

John Henwood, the pauper, originally ſettled at Ufton, came to reſide with his father John Henwood, about 23 years ago, on a cottage and premiſes at Mortimer, Hants, which his father had occupied ſeveral years. By indenture or deed of feoffment, dated 10th October 1766, with livery of ſeiſin indorſed, and duly executed, *in conſideration of natural love and affection, and of* 10 *l. to him paid* by the pauper, John Henwood, the father, granted, enfeoffed, and confirmed, the ſaid cottage, &c. to the pauper in fee. About three years and a quarter afterwards, the pauper obtained from the pariſh of Ufton a certificate dated 1ſt January 1770, duly ſigned, certified, and allowed, acknowledging that he and his wife and family were inhabitants legally ſettled in Ufton. And the pauper afterwards occaſionally received relief from Ufton during his reſidence in the cottage at Mortimer. The father of the pauper lived with the pauper upon the premiſes till his death, which happened about eight years ago. The pauper was his eldeſt ſon and heir at law, and continued to reſide upon the premiſes until the year 1788. The pauper by leaſe and releaſe dated 15th and 16th February, 1788, conveyed the ſame premiſes to John Stert for 50l. which ſum appeared upon evidence to be a ſatisfaction for a debt due for neceſſaries provided by Stert for the pauper and his family, and for money lent. The pauper being afterwards turned out of poſſeſſion by Stert, to whom, after the ſale, he had become a tenant, returned to Ufton, and was removed to Mortimer.

It was argued in ſupport of the Order of Seſſions, That this was a purchaſe for money within the 9th G cap. 7. and therefore gave no ſettlement; 2dly, That certificate given by Uſton to the pauper, was concl againſt the pariſh granting it.

LORD KENYON, C. J.—There is nothing in either o points made at the bar; the firſt of which has been ſe theſe forty years, and the other near a century paſt (Fo. 2 In *Rex* v. *Marwood*, it was contended that *purchaſe* u the 9th *Geo.* I. cap. 7. was to be underſtood as contr tinguiſhed from *deſcent*; as in a former caſe, *Rex* v. *S bridgeworth*, upon the ſubject. But the Court exploded idea; and ſaid that the Legiſlature only intended to pre perſons, who made ſmall purchaſes for *pecuniary* conſid tions, from gaining a ſettlement; but that donations f a father to his child did not come within the ſtatute. N in this caſe we are bound to take notice that this con ance was in conſideration of *natural love and affection* as as 10l. And we cannot ſuppoſe that 10l. was the real lue of the eſtate, for there are circumſtances in the caſ ſhew the contrary: the caſe itſelf ſtates that it was af wards ſold for 50l. Perhaps the 10l. was taken, bec the father had ſome other child, upon whom he wiſhe beſtow ſomething ariſing out of this eſtate, and he took mode of doing it. This, being a donation from a fathe a ſon, is clearly not a purchaſe within the 9th *Geo.* I. cap notwithſtanding part of the conſideration was in money. the other point, not the ſmalleſt doubt can be entertain for though the certificate was concluſive at the time, it afterwards done away by the pauper's reſidence on his c property at Mortimer.

Order of Seſſions quaſhed

BALL v. HERBERT.

This was an action of treſpaſs for breaking and ente the plaintiff's cloſe, being part of an artificial bank adj ing to the river Ouze, in Norfolk, and treading down graſs with men and horſes, and towing certain barges.

Plea, that the port of Lynn hath been immemorial common and public port, and that the river Ouze hath b immemorially a public King's highway and navigable riv that this cloſe hath been immemorially part of the bank and adjoining the ſaid highway and navigable river.

The general queſtion was, whether, at common law, the public have a right to tow veſſels on the banks of either ſide of a navigable river?

LORD KENYON, C. J.—I remember when the caſe of *Peirſe* v. *Lord Fauconberg* was ſent here from the Court of Chancery, it was the current opinion of Weſtminſter Hall that the right of towing depended upon uſage, without which it could not exiſt. It has been ſaid that this right now in queſtion is of great importance to the navigation through ſeveral counties; now if this navigation has been carried on for a ſeries of years, and this right of towing conſtantly exerciſed, there would be abundant uſage on which it might be ſupported. But that is abandoned, and the defendant reſorts to the common law right. Now common law rights are either to be found in the opinions of lawyers, delivered as axioms, or to be collected from the univerſal and immemorial uſage throughout the country. That the right now in queſtion is not to be collected from the unanimous current of authorities, is manifeſt. Very little is to be found in the books upon the ſubject, the whole of which, down to his time, Lord Hale has collected; and after commenting upon it, he ſeems to have formed an opinion againſt the right: for he ſays that, where private intereſts are involved in the queſtion, they ſhall not be infringed without a ſatisfaction being made to the parties injured. But on what ground can a common law right ſtand, if ſatisfaction is to be made for the enjoyment of it, and that ſatisfaction not aſcertained: it muſt reſolve itſelf into an agreement between the parties, and cannot be conſidered as a right to uſe the banks *indefinitely*. And ſome of the paſſages in Lord *Hale*, which ſeem to favour the common law right, are rather applicable to banks of the ſea, and to ports; and it is part of the King's prerogative to create ports, which was lately exerciſed at Liverpool. Then is this bottomed on immemorial uſage: the right is not claimed on one ſide or the other as is moſt convenient, but on both ſides of the river. But that is directly contrary to common experience; for if we look at any of the great public rivers, we ſhall find that it is not uſed, although it would be highly convenient to the perſons uſing the navigations. On the contrary the navigators are obliged at ſeveral places to paſs from one ſide of the Thames to the other with great inconvenience and delay; that is the caſe by the Duke of Montague's gardens between Richmond and Kew, and in various other parts. Such is the right on that river, the *quantum* of which is aſcertained by the uſage. That there is ſuch a cuſtom on moſt

of

of the navigable rivers no perſon doubts, but ſtill the right is founded ſolely *on the cuſtom*; but here the claim is ſet up without any cuſtom at all. The authorities which have been mentioned are very few. The caſe in Lord Raymond, 725, though before an eminent Judge, was only a *niſi prius* deciſion. It is a ſhort note taken by Lord Raymond, when he was very young: not even the name of the caſe is given; and it does not appear what the caſe was, or how the queſtion aroſe: I rather think the principal queſtion there was whether, when a right of paſſage was aſcertained, and that was founderous, the party entitled might not go on the adjoining land. However, at moſt it is only an opinion delivered at *niſi prius*; oppoſed to which is that of Lord Ch. J. Willes in the caſe cited. And Lord Hardwicke's opinion was againſt the right, as is evident from the manner in which he ſent the caſe of *Peirſe* v. *Lord Fauconberg*, into this Court, which was very fully conſidered. Therefore on theſe authorities, on the ſilence in the books reſpecting this common law right, and on account of the extreme inconvenience, to which individuals having lands adjoining the public rivers would be ſubject, I cannot bring my mind to ſay that the defendant's juſtification can be ſupported. Perhaps ſmall evidence of uſage before a Jury would eſtabliſh a right by cuſtom on the ground of public convenience: but the right here claimed extends to every bank of every navigable river throughout the kingdom.

ASHHURST, J.—I am of opinion, firſt, that no ſuch *general* right exiſts as that claimed; and ſecondly, if *any qualified* right could be ſupported, the defendant's plea is not adapted to it. As to the firſt: it ſeems extraordinary (if there be any ſuch right) that it is not defined with greater certainty in any of our law books. For it is a right that in its nature muſt, if it exiſted, be ſubject to ſome reſtrictions; as that it ſhould be exerciſed only on one, and that the moſt convenient, ſide of the river: for it would in many inſtances be a very oppreſſive right if it could be claimed *on both ſides*, and yet the defendant's claim would go to eſtabliſh a right on both ſides. The inſtances which have been mentioned where the right of towing has been given by ſeveral Acts of Parliament alſo negative the idea of general right; for we are not to ſuppoſe that rights ſhould, from time to time, have been given by the Legiſlature which exiſted before; and it is no anſwer to ſay that ſuch proviſions were inſerted *ex abundanti cautelâ*. And the reaſon aſſigned by the defendant's counſel why ſuch a right was given by the 24th *Geo.* II. cap. 8, namely, becauſe that part of the river was

not



not navigable before, is not satisfactory; for when once a river becomes navigable, or, in other words, when it is made a common highway for all the king's subjects, that right would immediately attach. On the general ground therefore I think no general right of towing exists. But then it was contended that a right might be supported on making a reasonable compensation to the owner of the land. Lord Hale touches this right very tenderly; for he says that it does not exist without making a reasonable satisfaction. But it is not necessary to enter into that question here; because, if it were a right *sub modo*, it ought to have been so claimed in pleading. And even if such a right existed, the party should either pay or tender a reasonable satisfaction in order to give him that right. For it would be to no purpose to give the owner merely a right of action to recover that compensation, when it is to be enforced against strangers passing by, whom the owner cannot know, and who, perhaps, may be foreigners.

BULLER, J.—The defendant's plea on this record rests wholly on a general common law right; in deciding which it is not necessary to go into the question, which has been made, respecting the mode of pleading. This being claimed as a common law right, it can only be proved to exist by one of the ways mentioned by my Lord. As to the general usage throughout the kingdom, of which the Court is obliged to take notice, that clearly does not exist. Then the question is, whether in our books, or on records, that right is established for which the defendant contends. The case in Lord Raymond is a very loose and inaccurate note. Another authority cited is the passage in Bracton, and quoted by Callis: that plainly appears to have been taken from Justinian, and is only part of the civil law; and whether or not that has been adopted by the common law, is to be seen by looking into our books; and there it is not to be found. Callis compares a navigable river to an highway; but no two cases can be more distinct. In the latter case, if the way be founderous and out of repair, the public have a right to go on the adjoining land: but if a river should happen to be choaked up with mud, that would not give the public a right to cut another passage through the adjoining lands. Therefore I am of opinion that no common law right of towing exists. But I wish not to be precluded by this determination from giving an opinion on the question, which has been made on the pleadings, whenever it shall arise in future. At present I cannot agree with what

what has been ſaid on that head. This is not like the caſe of toll thorough. The diſtinction, which has been made between toll thorough and toll traverſe, is not where the queſtion ariſes on a defence merely, but where the right itſelf of taking toll has come in queſtion. And the diſtinction taken is, that the party, who claims toll thorough, muſt ſhew a conſideration for it, becauſe it is againſt common right. Then if the defendant is right in ſaying that by the common law he has a right to go on the banks of navigable rivers, he need not ſhew any conſideration, and the owner of the land would not be entitled to any ſatisfaction till after the defendant had uſed the towing-path. Cuſtoms, which are conſiſtent, may be pleaded againſt each other. And the party pleading a general cuſtom need not ſhew the modification of it, which is not inconſiſtent with the right claimed by him. The caſe of *Kenchin* v. *Knight*, is ſtrong to this point: there the defendant pleaded a cuſtom to put ſwine upon a common; to which the plaintiff replied that he could only put in ſuch ſwine as were rung, without traverſing the cuſtom ſet up in the plea: and the replication was held good on demurrer, becauſe the cuſtoms were not inconſiſtent. Now here, if every ſubject has a right to tow on the banks, making a reaſonable ſatisfaction, it is not neceſſary for the party to plead ſuch ſatisfaction, becauſe that claim ariſes afterwards. And if it were otherwiſe, it would be attended with manifeſt inconvenience; becauſe, the ſum not being aſcertained, it would be a perpetual diſpute between the owners of the barges and the land-owners how much ſhould be paid, which would be deſtructive of the right of the public, and the navigation would be ſtopped till the quantum was aſcertained. I have ſaid thus much on the ſubject leſt I ſhould be precluded from conſidering the queſtion, whenever it ſhould ariſe: but in the preſent caſe I am of opinion againſt the common law right. In addition to the obſervations made on the caſes cited, I think that the inſtances of the three great rivers alluded to are very ſtrong againſt the right. From what paſſed in the caſe of *Vernon* v. *Price*, it ſeems as if Lord Ch. J. Willes entertained a wiſh that the public ſhould have this right, and yet he could find no legal ground on which to ſupport it; for the application to parliament in 1748, is ſaid to have been made with his approbation. On the river Trent there have been ſome claims of this ſort of a more recent date not unworthy notice. The perſons paſſing there with barges endeavoured to ſet up this right, in conſequence of which ſeveral actions were brought againſt the barge-owners, who, on being adviſed

viſed that they could not ſupport the right, ſuffered judgement to go by default. But they ſtill continued their towing, on which actions were again brought againſt ſixty or ſeventy perſons at the ſame time, and then they abandoned their claim. The ſtate of the banks of the Thames alſo affords a ſtrong argument againſt this common law-right; for if it exiſts, all the houſes built on thoſe banks muſt be conſidered as nuiſances.

GROSE, J.---I perfectly agree in the general poſition, that there is not any *general* common law-right of towing.

Judgment for the defendant.

NOBLE *v.* DURELL *and others.*

The Jury choſen by the Court-Leet for the town of Southampton, ſeized upon a quantity of butter belonging to the plaintiff, becauſe it contained leſs than 18 ounces to the pound; whereas by the cuſtom of that town every pound of butter expoſed to ſale in the markets, ought to be of the weight of 18 ounces. This was an action of treſpaſs for ſo ſeizing the plaintiff's butter, which the defendants juſtified and pleaded the cuſtom aforeſaid. The queſtion, therefore to be tried was, whether this cuſtom was good.

LORD KENYON, C. J.---In deciding this queſtion, I wiſh noi to be underſtood to ſay that a cuſtom may not prevail that butter ſhall be ſold in *lumps*, or *yards*, containing any given number of ounces: but the queſtion now before the Court is, whether a cuſtom in Southampton, that a *pound* ſhall contain 18 ounces, can be ſupported in law. To ſay that it can, would be to violate all the rules of language, as long as the Acts of Parliament which have been cited are to regulate this ſubject. This has engaged the attention of the Legiſlature for five centuries, and they have thought it of the utmoſt importance that there ſhould be one ſtandard of weights and meaſures throughout the kingdom. But it is ſaid, that there is no objection on the ſcore of reaſon and convenience why this rule ſhould not be relaxed in a particular town; becauſe, when the exception is once eſtabliſhed, the inhabitants of that town will ſquare their notions accordingly. But it is material to conſider whether the exception to the rule will be confined to butter only: if this cuſtom can be eſtabliſhed, it may alſo be extended to hops in Kent, or to any other commodity in any other part of the kingdom; and thus the greateſt confuſion will be introduced

duced on a ſubject that ought to be particularly plain. So one meaſure might prevail at Pool, another at Dartmouth, &c. and thus foreign merchants would never know on what terms they were treating. It might be as well contended that a cuſtom could prevail in a particular place, that a leſs number of days than 7 ſhould conſtitute a week; or that a leſs ſpace of ground than an acre ſhould be called an acre. It was then objected that, even ſuppoſing that the ſtatute of *Hen.* VII. applied univerſally, the old cuſtoms ſhould prevail till the weights and meaſures were ſent down from the Exchequer, which was directed to be done by that act; and that the plaintiff ſhould have replied that in point of fact they were ſent to Southampton. But the Legiſlature did not ſay that, till that was done, the old cuſtoms ſhould prevail. And we cannot ſuppoſe that that, which the Legiſlature directed, was not done. The ſtatute of 13 & 14 *Car.* II. cap. 26, takes it for granted that a pound ſhall conſiſt of 16 ounces, and that the weights and meaſures had been ſent to the different parts of the kingdom. There are two kinds of weights; one containing 12 ounces of a certain denomination, the other 16 ounces of another denomination; and it appears that butter has always been ſold by the latter. Then it was ſaid, that cuſtoms may prevail againſt common law: but they are ſuch *conſuetudines* as are reaſonable and beneficial; but this is the reverſe of both; for all mankind have concurred in agreeing, that for their mutual convenience they ſhould be regulated by one uniform ſtandard.

ASHHURST, J.—The only ground on which this cuſtom can be ſupported, is a ſuppoſition that the Legiſlature did not intend to interfere with the cuſtoms of any particular place. But that is totally unfounded; for the Legiſlature ſuppoſed that, at the times when the ſeveral acts paſſed, different weights and meaſures prevailed in different towns; to remedy which inconvenience they paſſed thoſe acts. And in none of them is there any reſervation of any ancient cuſtoms; but they are applicable to every place, directing that in future there ſhall be but one weight and meaſure throughout the kingdom.

BULLER, J.---This caſe does not interfere with the queſtion alluded to in the argument, whether a cuſtom to ſell butter in *lumps* of any particular weight is good or not. That queſtion will remain, notwithſtanding this deciſion, as it did before: and I have never ſeen any thing in the Acts of Parliament requiring perſons not to ſell more or leſs than a pound. But the queſtion here is, whether, when a perſon

is



is ſelling butter under the ſpecific denomination of a *pound*, he ſhall be compellable to ſell more than a pound. Butter is directed to be ſold by Avoirdupois weight, where a pound conſiſts of ſixteen ounces. Then how can a perſon, who profeſſes to ſell a pound of butter, be compellable to ſell more than a pound?—I am of opinion that the cuſtom cannot be ſupported.

GROSE, J.—Of the ſame opinion.

Judgment for the plaintiff.

REX *v. inhabitants of* ACKLEY.

CASE.

The pauper, on Saturday the 13th of October, 1787, being three days after Old Michaelmas Day, was hired to T. Clarke, of Ackley, in the county of Oxford, to ſerve until the next Michaelmas. He accordingly continued in ſuch ſervice till Saturday the 11th of October, 1788, being the day after Old Michaelmas Day, which (it being Leap Year) happened on a Friday, and was paid his wages and went away. As this was a ſervice of 365 Days, the Court of Seſſions thought it gained him a ſettlement in Ackley, and confirmed the order of removal, by which he and his wife were removed from Biceſter to Ackley.

BY THE COURT,—Here was no hiring for a year: it is ſtated that the pauper, three days after Michaelmas, contracted to ſerve till the Michaelmas following; this was therefore a hiring for two days ſhort of a year. And though this Court has been extremely indulgent in determining that *ſervices*, which have been in point of fact leſs than a year, ſhall be ſufficient to confer a ſettlement, as where the pauper has been abſent with leave, &c. yet they have been always ſtrict in regard to the contract of *hiring*.

Order of Seſſions reverſed.

REX

REX *v. the* JUSTICES *of* YORKSHIRE.

This was a rule to ſhew cauſe why a *mandamus* ſhould not iſſue, directing the defendants to hear an appeal of the inhabitants of Gate Helmſley, againſt an order of two Juſtices, for the removal of a pauper from Strenſall to Gate Helmſley The order was made on the 26th of November, and executed on the 28th. The appellants attended the next Quarter Seſſions, held on the 13th of January, and moved for leave *to lodge the appeal and to reſpite the hearing* to the then *next* Quarter Seſſions. The following entry was made by the Seſſions: "Foraſmuch as it appears to this Court that there has been ſufficient time ſince the removal of the paupers for the appellants to give notice and come prepared to try this appeal at this Seſſions, and no cauſe ſhewn why they did not proceed accordingly, it is ordered that *the motion for lodging the ſame, and reſpiting the hearing to the next Quarter Seſſions, be rejected.*"

In ſupport of the rule it was contended, that it was not diſcretionary in the Juſtices at the Seſſions to permit the parties to appeal; the ſtatute is compulſory on them, and ſo alſo is the ſtatute 9 *Geo.* I. for adjourning the hearing. And though it was perhaps irregular to make the motion to reſpite the hearing before the appeal was entered, yet at any rate the Juſtices were not warranted in refuſing to receive the appeal.

BY THE COURT.—The Juſtices have not acted wrong; for the motion was in effect to adjourn the appeal. And it was evidently the intention of the parties not to enter the appeal, unleſs the Court would adjourn it. The Juſtices are to judge of the reaſonableneſs of the time; and in ſome counties they eſtabliſh a rule regulating the time of notice. Here it appears that the order of removal was executed on the 28th of November, ſo that there was ſufficient time for the appellants to give notice, and to come prepared to try it; and the Juſtices, who are to judge of this, thought ſo.

Rule diſcharged.

The



The TRIAL *of* JACINTHO PHARARO, ANTHONI MURRINI, *and* STEPHEN APOLOGIE, *for the murder of* JOSEPHI, *a Sardinian.*

OLD BAILEY, *April* 16, 1790.

Jacintho Phararo, Anthoni Murrini, and Stephen Apologie were indicted for that they, in the 14th of March laſt, at the pariſh of Bedfont, felonioufly, wilfully and of their malice aforethought, did make an aſſault on one Joſephi, then and there being; and that he the ſaid Jacintho Phararo with a certain knife, in and upon the neck of the ſaid Joſephi, felonioufly, wilfully, and of his malice aforethought did cut, giving him in and upon the neck one mortal wound, of which he then and there inſtantly died; and the Jurors further charge, that they the ſaid Anthony Murrini, and Stephen Apologie were preſent, aiding, abetting, comforting, aſſiſting, and maintaining him the ſaid Jacintho Phararo to do and commit the ſaid murder.

Mr. MAZZINGI *was ſworn Interpreter.*

Frederico Solari. I am a Genoeſe ſailor. My father keeps a public houſe: I landed at Goſport: we were all together in one ſhip. I ſhipped myſelf at Genoa, in the ſame ſhip with the three priſoners and the deceaſed, Joſephi; he ſhipped himſelf in the iſland of Sardinia: we were four days at quarentine, and from thence we came into the harbour of Portſmouth, to wait for orders. After I was diſcharged, I lodged with the three priſoners and the deceaſed, in one lodging; we lodged there about ſix days.

Queſ. Do you know whether theſe people had any property at that time?

Solari. They received with me: I received two guineas and a half, and they received one guinea and a half: I ſtaid there about ſix days.

Ques. Had Joſephi any property?

Solari. He had nothing; he received may be about a guinea.

Queſ. Had he any more property?

Solari. He had property: he received from the captain that came from his friends three joes and a half, double joes, which go for three pounds ten; he changed one of them in Goſport for three pounds ten; if they are worth

worth more I cannot ſay. He ſpent about half a joe in his lodging; he bought a pair of black ſtockings, a hat and a pair of buckles. They ſet out on Wedneſday, after dinner, to come to London, about three o'clock; I do not recollect the day of the month. They aſked me if I would like to ſee them on the London road? which I ſaid I would: we ſtaid in the lodging four or five days, and my money was almoſt gone, and I came up by the coach; they ſet off to walk.

Ques. Did they all four ſet off together?

Solari. Yes.

Ques. How long after was it before you heard of this affair?

Solari. I was in London from one Thurſday to the next Thurſday, when they took me. I was afterwards at Bedfont, and ſaw the body. It was the body that was in company with theſe priſoners. Before they ſhewed me the perſon, I ſaid he was wounded in two places in his hand; and he had a ſilver relick which when I left him, he uſed to wear about him; it was round his neck, and uſed to come before his breaſt. He valued it more than his life; I heard him ſay ſo thouſands of times on board; ſeveral of the ſhip's company heard him ſay the ſame.

Court. Aſk them if they would aſk this witneſs any queſtions.

Priſoners. We wiſh to aſk whether the pair of metal buckles that were found upon one of the priſoners, the deceaſed did not give to him at Goſport?

Solari. I was in a public houſe; the three went with the deceaſed to buy a pair of buckles; if the deceaſed gave him the buckles; I did not ſee it.

Stephen Hudſon. I keep the White Lion, at Staines. On the 13th of March laſt, about four in the afternoon, the three priſoners came to my houſe; the man on the right hand, pitted with the ſmall-pox, he could talk a little Engliſh, and I could underſtand him: he aſked me if the four could have a lodging? I looked at him, and ſaid they might; and they walked in all four together, and ſat down in the box; they called for a pot of beer; a pot of beer was fetched; they then aſked for ſome tobacco; I ſaid I did not ſell it, but would ſend for ſome; the deceaſed man pulled out his purſe, and gave that man a ſhilling, and he gave it to the boy; that man ſaid a ſhilling's-worth.

Queſ. Did you obſerve the purſe?

Hudſon. To my knowledge, as far as I ſaw, I judged it to be a kind of a greaſy dirty leather purſe; but I never had it in



in my hand; the boy fetched a ſhilling's-worth of tobacco, and brought it to them; they filled each of them a pipe, and began ſmoaking a little while, while they drank their pot of beer; by that time they aſked what they could have for ſupper? They aſked for a barber; and I ſent my boy with them all four together, to Mr. John Lamb, to be ſhaved. They returned in about a quarter of an hour, and came and ſat down in the ſame place.

Quef. When did they leave your houſe?

Hudſon. On Sunday morning, juſt at four o'clock; that is, the next morning, the 14th; they got up and waked me; I got up and let them out; and juſt as I let them out, the clock ſtruck four.

Quef. Are you ſure that the body you ſaw was the body of the fourth man that was at your houſe?

Hudſon. I am very clear it was. He paid every thing at my houſe; I received no money from any body elſe but from him.

John Lamb. I live at Stains: I am a barber. The four men came to my houſe on Saturday the 13th of March. I am ſure theſe are three of the men; there were four in company; I ſhaved them all myſelf. I heard one was the perſon that was murdered, and I went out of curioſity; and ſaw it was the body of one of the perſons that was at my ſhop. He took his money out of a black leather purſe; but particulars I could not tell; he was the pay-maſter for all of them. I had no doubt on the view of the body, that it was the body of the fourth perſon; and I am ſure that theſe three perſons were in company with him.

Court to Interpreter. Explain to the priſoners this evidence.

Priſoners. It is very true: we gave him a ſhilling.

William Henley. I am a labouring man at Bedfont, about three miles and a half from Stains. On the 14th, about a quarter before ſix, I ſaw three men paſs; I am not ſure of the three; but the man on the left hand walked in the middle; they walked ten or a dozen yards at a diſtance. There were no more than three. The man I mean is Phararo. About a quarter before ſix, they were coming from London.

Priſoner Phararo. The reaſon I was behind, was, I had a ſore foot.

Court to Henley. Do you know the place where the body was afterwards found?

Henley. Yes.

Quef.

Queſ. Was the place where you ſaw this man, further from Staines, more on the way to London?

Henley. It was found nearer Staines; it might be about three hundred yards from where I ſaw them.

Priſoner Murrini. We parted from the deceaſed about eight o'clock in the morning, as well as we can recollect, near a bridge.

Richard Foot. I am a labouring man: I live at Bedfont: I found a body about five o'clock on Sunday afternoon. I ſaw the appearance of a body dragged along out of the high-road, about one hundred and twenty yards along a wheat-field; it perfectly ploughed up the way; there was a great large quantity of blood, where he had been laid down under a hedge; the ditch was not deep enough to bury him; and they took him up from there, to carry him to the place to bury him; the blood was in the high-way; there was no blood in the path where the body had been dragged, only the print of one man's foot: I ſuppoſe the quantity of blood where they laid him down under the hedge, was as big round as my hat.

Court. Did there appear much trampling in the blood?

Foot. No, only one man's foot, by what I could diſcern; there was not a drop of blood all along the track.

Queſ. What was the appearance of the place where the body was depoſited? Was there any blood?

Foot. None at all: the body was buried in ſand four or five inches deep, in ſand which had been carried out of the high-road; they afterwards pulled off the graſs off the bank, and ſhook a-top of him, and then the boughs and buſhes covered it.

Court. The body was covered with ſand and graſs and branches?

Foot. Yes; where they ſtood underneath the hedge, it ſeemed as if the traces of foot-ſteps had been ſcratched out, that you could not ſee the appearance of a man's foot, nor a horſe's foot, nor ſheep's foot, nor any thing in the world; that was the place juſt under the hedge where they ſtood.

Queſ. Was there any appearance of the ground having been harrowed up in the field?

Foot. No, not along the track where they dragged him.

Court to Hudſon. What ſized man was the deceaſed: was he a large man?

Hudſon. No, but a ſhortiſh man.

Queſ. How was the body?

Foot. It was laid as ſtrait as ever you ſaw; his throat was cut; his left ſhoulder, on the bone, was cut all to mummy;

he was ſtruck over the head, and had three cuts over the chin, before ever they cut his wind-pipe; his wind-pipe was cut quite through. The body was quite dead.

Court to Interpreter. Tell them, on the Sunday afternoon, about five o'clock, he ſaw the body; that it appeared to be dragged over a wheat-field, about one hundred and twenty yards on the highway.

Priſoners. We are very ſorry for the poor departed ſoul, but we know nothing about him.

Priſoner Phararo. It is no reaſon why, becauſe the man was found murdered, and becauſe he was a foreigner, and we are foreigners, that we ſhould be accuſed; it is moſt likely that the man that is an evidence againſt us, killed the man.

——*Banniſter.* I live at Bedfont. I ſaw the body juſt as it was taken out of the ditch; it was Sunday evening I think, to the beſt of my recollection; it was a quarter after five; I have the remainder of the clothes that were left upon it; the ſhoes were loſt, and the breeches or trowſers, or what it was, were loſt, and the hat was loſt; theſe are the clothes that were over the body that was murdered. Theſe two combs were found on the body that was killed, and two-pence halfpenny and a buckle.

Patrick Sheen. I live in Great Horſley-down: I know the three priſoners; they came to Horſley-down New-ſtairs to me, on Sunday, between nine and ten in the morning: the ſhort man, Murrini, aſked me to drink a pot of beer; and I told him I had no money; and he ſaid he would pay for the pot of beer, as plain as I can ſpeak to you now; they were all three in company; I took them to the lodging; they called for a pot of beer; they gave me a ſhilling to get them ſome meat; that ſhort man ſhewed me his ſhip he ſaid he was going in; I ſaw no more of them that night: but on Monday morning that ſhort man came to me, and aſked me to ſhew him a goldſmith's ſhop, to ſell ſome gold; they were all three in company together; I took them to Tooley-ſtreet, to a man whoſe name I cannot tell; he weighed the piece, but he could not underſtand what the value of it was; and he gave me a bit of a direction to carry it to Mr. Smith, and he gave me ſix-pence for my trouble.

Interpreter. My Lord, the priſoner Murrini ſays the man muſt be miſtaken in point of the hour, becauſe a little after they came to London, they met with a cobler, who ſhewed them the way to Horſley-down; and before they reached there it was paſt one.

Court to Sheen. Recollect yourſelf as well as you can, as to the time?

Sheen. It was between nine and ten, as nigh as I can recollect.

John Smith. I am a ſilverſmith and ſaleſman: on Monday (I think it was the 15th of March) in the forenoon, the laſt witneſs brought me a piece of foreign gold; it is a doubloon, ſeventeen penny-weights, nine grains; it is worth three pounds fifteen an ounce, which is three pounds five and a penny, the real worth of it; I gave him three pounds four ſhillings for it: Murrini was with him; it was one of thoſe two little men; I think it is the man; I cannot be poſitive.

Robert Dawſon. I am a headborough; and I attend the Public-Office in Eaſt-Smithfield: I received information from Bow-ſtreet, on Monday the 15th, from the Magiſtrates; in conſequence of which I went down to the public houſes kept by foreigners, and gave ſuch information as I thought neceſſary; nothing tranſpired till the Thurſday following; then I received information that three perſons anſwering the deſcription I had given, were ſeen to come to Union ſtairs, Wapping, and that they were purſued; that two of them had made their eſcape, but the third was in cuſtody of ſome people at Wapping: I went down in company with Mayne, another officer, and apprehended the middle priſoner, Apologie; he was the perſon I found in cuſtody; before that I had apprehended Solari; and he on that day was gone to Bedfont to view the body.

Court. Do you know when Solari came to town of your knowledge?

Dawſon. No; he told us he came to town on the Monday before: I had given deſcription of the three people; I had it in writing from the Magiſtrates in Bow-ſtreet; and he being a foreigner, and had come from Goſport, the people I had ſpoke to, apprehended him: on ſearching the priſoner Apologie, we found on him a pair of trowſers that were very bloody.

Court. Were they making part of his dreſs?

Dawſon. Yes; they were what he then wore; we took them from him, and locked him up; ſecured him; and then went down the river in a boat, in ſearch of the other two priſoners; we chaſed them on board ſeveral ſhips, and over from one ſhip to another, in the tiers as they lay: and they got away from us on the ſouth ſide of the water, and got into a boat, and were rowed in that boat from that ſide of the water over to Union-ſtairs again, to the tier of ſhips; and

and they got on board a Spaniſh ſhip; we found them on board the ſhip, and ſeized hold of them; and, after ſome reſiſtance, we ſecured them, and handcuffed them; we got them into the boat, and then proceeded to ſearch them; I ſearched the priſoner on the right hand, that is, Phararo; and in his left hand waiſtcoat pocket, I found this purſe; it appears to be a ſkin: (*like a dirty leather purſe*); and this knife, which appeared then to have blood upon it very freſh: (*a large claſp knife*): I likewiſe found this paper in his pocket, which appears to be an account from the captain; and in his right hand waiſtcoat pocket, I found theſe two ſtrings of beads (*Roman Catholic beads*): I found nothing elſe upon him at that time; Mayne ſearched the other two when we came up to the King's-Arms in Eaſt-Smithfield, a houſe in which are lock-up rooms appropriated for the uſe of the office; we ſearched him again there, and found nothing more at that time upon him; I put ſome irons upon the two priſoners on the right hand, leaving Anthoni Murrini with a pair of hand-cuffs only, and then I took him (Murrini) to point out the houſe they lodged at: he took me to the ſign of the Black Bull at the back of St. John's church, Southwark; and in a two pair of ſtairs room (the landlady ſaid that the priſoner and two others lodged there; the priſoner was preſent; the priſoner took me to that room as his room;) on ſearching the room, I found a quantity of wearing-apparel; and when we came down into the tap-room, I deſired he would inform me of the different articles, and the perſons to which they belonged; ſome he claimed as his own; he picked out this pair of trowſers, having belonged to Phararo; I brought him over again to the King's-Arms, and there I brought the priſoners into a room all together, and let them claim their property; and Phararo claimed theſe trowſers; my reaſon for that was, that theſe trowſers were very bloody.

Priſoner Phararo. It is paint.

Dawſon. Nothing elſe appeared on the ſearch; the witneſs, Solari, had not then arrived from Bedfont; but I charged them on ſuſpicion. About half paſt nine, the ſame Friday night, Solari returned from Bedfont; and I found this hat on the head of Murrini.

Priſoner Murrini. We were all three apprehended together, but if he ſwears that we attempted to run away, he ſwears falſe, for the moment we ſaw the boat coming along-ſide the veſſel, we made no reſiſtance.

Peter Mayne. I am an officer belonging to juſtice. I went with Dawſon in purſuit of theſe men; after a chace

of ſome time on the river, from one tier to another, we purſued them on board of a Spaniſh ſhip, laying off Union-ſtairs; there we apprehended the priſoners, after ſome ſtruggle; and round the neck of Murrini I found a relique, a Madona. I took theſe trowſers from the middle priſoner, Apologie, which appeared to me to be bloody.

Court to Solari. Look at that hat?

Solari. This is the hat the deceaſed wore; I went with him to the ſhop to buy it; the gentleman put a bill in the middle; I aſked him for what? He ſaid, we muſt not ſell any hats without; I took the bill off; I ſaid, I ſuppoſe it is of no ſervice now? Says he, you may throw it any where; it left a black mark; and I ſaid, that black mark is as good as the bill. Theſe are the buckles, that he had on the whole voyage, and that he came on board in. I cannot ſay any thing to thoſe plated buckles, becauſe I was not with him when he bought them; but I am ſure the other buckles are the buckles that he wore on board, and that he came on board in; when he ſet off he had a pair of new buckles on. That is the purſe that belonged to the deceaſed; I know it, becauſe he always had a goe of tobacco in it; nobody elſe had ſuch a purſe; it is made of ram-ſkin. And that is the relique the man had about his neck the whole voyage; and when I left him in company with theſe three, he had it on; nobody elſe had one on board; I am ſure of it; he ſaid it would keep him from all danger ſome time in action. Theſe are the pair of trowſers that belonged to the middle priſoner, Apologie.

Court. Aſk the priſoners, one by one, what they have to ſay, and whether they have any witneſſes to call; tell them they now ſtand for their lives; and the conſequence will be, that death muſt follow the verdict of the Jury, if it be againſt them.

The Interpreter delivered the Priſoner Phararo's Defence.

They left the deceaſed at a bridge near London; the man on the left hand ſpoke to a man, deſiring to conduct him to the water ſide, and they did not reach London till between eleven and twelve; the moment they arrived near the water ſide they got into a houſe, and afterwards went about to find a ſhip, and after they were on board a ſhip, that man and others came on board and ſeized them; the old man who was a witneſs here, the laſt but one, offered to find them a ſhip, ſaying that he knew a veſſel that wanted ſailors; after this converſation they went to church, and coming from church they pulled out a foreign piece of coin, which th

they deſired might be ſold; they gave it to the old man; they went to ſeveral places, and could not get this coin changed, but at laſt did change it the next morning; and after changing it, the old man kept three ſhillings; and he flattered them every day that he ſhould be able to get them a ſhip; he lived upon them; and when he found they had no more money, he abſconded; he ſays, he will now explain to you how he came by this hat, and things belonging to the deceaſed; they changed cloaths.

Priſoner Apologie's Defence.

I have nothing to ſay more than the other.

Priſoner Murrini's Defence.

The deceaſed was a paſſenger on board the veſſel; and the Captain had promiſed to take him to Malaga; when the veſſel was near Malaga, whether the Captain thought he had a favourable wind or not, he told us he could not go to Malaga; and wanting hands on board the veſſel, the Captain told this paſſenger if he would take on himſelf the office of cook, the cook ſhould act as ſailor, and he would ſave his expences. The deceaſed anſwered him that he was not capable: then the deceaſed called me upon deck, and begged me to aſſiſt him, and he would recompence me when he came to England; and likewiſe intreated me to lend him a pair of ſmall clothes, upon which I lent him a pair of ſmall clothes; and the evidence Solari was preſent at the time I gave him the pair of breeches; during the voyage, I never drank my ſhare of the wine, but the deceaſed and Solari drank my wine: we made our voyage ſafe into the port at Goſport; we landed together: when we landed, and were diſcharged from the ſhip, the Captain did not pay us our due: we lived on credit from the Sunday to the Monday, when the Captain paid our wages: the deceaſed had no money as well as us, for we all four together, from the Saturday to the Monday, we lived and lodged at a public-houſe on credit: the Captain gave the deceaſed three doubloons and a half; the deceaſed out of this purchaſed a coat, a pair of ſhoes, and two pair of ſtockings, out of that money; and we remained in Goſport three or four days: on our leaving Goſport, the landlord told us it would be better to leave our clothes and things, and to ſend them by the waggon; and before we departed, we changed our clothes again; and we conſigned to the waggoner, whoever he was, two ſacks, and two bags, for which the waggoner gave a receipt; and afterwards the landlord ſaid, I may as well make



make one bill, one ſack belonging to Solari, and two ſacks belonging to you: this man ſaid, he would ſew this receipt of the waggoner's into ſome part of his coat; and they all four ſet out together; and on the road he found he had forgot the paper; and he ſaid, Go on, my lads, I have forgot the receipt of the waggoner's, and I will go back and fetch it. We waited a little diſtance from Goſport, and ſaw him coming; then we purſued our journey, thinking he was behind: Solari overtook us, and ſaid, I am informed it will be better for us to go to London in the ſtage, which will coſt twelve ſhillings each. Upon which I ſaid, We have very little money, and the twelve ſhillings I ſhall want; I will walk; upon which the deceaſed ſaid, If you want to ride, I have money, I will pay for you all three; afterwards the deceaſed ſaid, We may as well walk, we will ſee the country, and we will ſee ſeveral villages; and here is a doubloon which will ſerve to pay our expences to London; but at that time the deceaſed did not give it us: having thus agreed, we parted with Solari, and purſued our journey, and I took Solari's hat by miſtake: we ſlept that night five miles beyond Goſport, or thereabouts. I now come to ſpeak of the relique: he had promiſed me on board, that he would give me a part, or ſome remnant of this relique; but after having walked eight or nine miles on the road, the deceaſed ſaid, Antonio, I will make you a preſent of this relique: we proceeded on our journey; he paid our ſhare; and the deceaſed ſaid, as I have promiſed you this doubloon, you ſhall have it: and at laſt we arrived to this fatal ſpot about twelve o'clock; and being wearied and tired, and having a ſore foot, I deſired to ſtop there to refreſh, which we all did: the moment we arrived, we had a pot of beer, and aſked the landlord where we could get ourſelves ſhaved? Upon which the landlord's ſon conducted us to a little barber's ſhop: the deceaſed, with the two other priſoners, were ſhaved; and the man ſeemed unwilling to ſhave him for the money: and the deceaſed ſaid, Oh, get yourſelf ſhaved; I will pay for it. We then returned, and deſired the landlord to provide ſomething for ſupper; for one paid one day, and one another: at night, while we were at ſupper, we entered into converſation about a hat, as ſaying that the hat that the man had bought, was too narrow in the crown; he aſked us to change it, accordingly we changed hats; that night we ſlept together; we deſired the landlord of the houſe to call us early in the morning, at four o'clock: and we went out, thinking it was five; we got up, and found it was four; after we were dreſſed, and ready to depart, the land-

landlord gave me two great coats that we had; and we had a glaſs of Geneva, for which we paid fifteen-pence: after we left the houſe, we continued in company together till we came to the bridge; and when we came to the bridge, the deceaſed told us, I find the other man has turned back to go to Goſport, I have a good mind to do the ſame; I will turn back too: on the bridge, we did not walk together, but at a diſtance from each other: but I do not know which way he took; but he ſaid to me, good bye, I have taken it into my head I will give you a guinea a-piece; and to Apologie for ſome ſervices he has done, I will give a guinea; and he gave us his purſe, and parted: we proceeded towards London, after parting with the man; and at a ſmall village near London, we looked at the clock, and it was then eleven o'clock. We frequently aſked when we found ourſelves near London (as well as we could make ourſelves underſtood) our way to the ſhipping: but at laſt I ſaid, let us at once take ſomebody to conduct us where we want to go, and a man ſhewed us to a poor cobler, who promiſed to conduct us; and when we came a little off this ſide of the bridge, we leaned for about half an hour on the foot of the bridge, without knowing which way to take; and I ſaid, I wiſh I could find out where ſome of the ambaſſadors live; we might go to them to aſk for a paſſage; thus we went towards the bridge: after we had walked over the bridge, we were going on a very long ſtreet, where we met the old man; he came up to us, and ſaid, My lads, I ſuppoſe you are ſailors; we ſaid, Yes. He ſaid, Do you want a birth? We ſaid Yes.--Looking at the water-ſide, he ſhewed us a veſſel; and told us, if you want to go on board a veſſel, I will ſpeak to the Captain to-morrow morning; then we thought we would not go to the ambaſſadors; and we aſked the man to get us ſomething to eat and drink, after finding ourſelves hungry: and we told him as we had no more money, we wiſhed to have that piece of gold coin diſpoſed of; the landlord told us he did not know the coin, and could not change it; and the ſame day we went to church to make our devotions; and the landlord offered to lend us a guinea on the coin till the next morning. Apologie made objection; ſays he, to-morrow you will go, and I want a part; either ſell it, or have no money at all: the next morning we applied about the veſſel; and the man told us he had not ſpoke to the Captain as yet; and every day he put us off from morning to night, from morning to night: afterwards he went with us to a ſilver-ſmith's ſhop, and changed that piece of coin.

LORD

LORD KENYON.—Gentlemen of the Jury, you have paid a very anxious attention to all the enquiry that has been made in the courſe of this caſe: that period of the cauſe is now arrived, when it becomes my duty to call your attention to the evidence that has been given; and, gentlemen, undoubtedly you find yourſelves in a very anxious ſituation; for it is impoſſible, as men carrying about you the feelings of human nature, that you ſhould not: for your verdict is to paſs on the lives of three of your fellow creatures: but beſides the importance of the caſe to the parties, it alſo muſt be important on the ſide of public juſtice; for it is of the laſt importance to ſociety, that thoſe guilty of enormities againſt the lives of ſociety ſhould not go away unpuniſhed for ſuch crimes. It is not neceſſary, therefore, for Jurys to ſteel their minds againſt compaſſion; God forbid! every indulgence is to be made to the priſoners: but ſtill you have a duty which you owe to your country, and that muſt be diſcharged with ſteadfaſtneſs, with firmneſs, and with fortitude; like men who feel they have ſuch a public duty impoſed on them, which the country expects, and has a right to expect, they ſhould diſcharge. Gentlemen, it is not neceſſary, in order to bring home the criminality in this or any ſuch caſe, that there ſhould be eye-witneſſes of the fact of the commiſſion of the crime: circumſtances, pregnant circumſtances, combined together, may make out a caſe to every man's ſatisfaction; and ſometimes various circumſtances, brought together from a variety of witneſſes, and all meeting together in one centre, may make it out more ſatisfactorily than the evidence of one witneſs, fallible as all mankind are, ſtating the facts that he ſaw: therefore, with theſe obſervations, I will ſtate the material parts of the evidence, and you will judge as well as you can: if you can find there is any diſcrimination in the caſe of the different priſoners, you will apply only to that man that which belongs to him in the teſtimony given; and not blend together, and confound in one common maſs of iniquity (ſuppoſing iniquity belongs to the priſoners) other particulars than thoſe which apply to each. (*Here the learned Judge ſummed up the evidence, and then added*) This is the evidence againſt the priſoners, in ſupport of the proſecution: and againſt this there is no evidence produced on the behalf of the priſoners: they being called upon to make their defence, have ſatisfied themſelves by delivering that which you heard repeated by the interpreter; and they reſt on the ſuppoſed difficulty of proof on the ſide of the proſecution: ſuggeſting this, that the murder committed

mitted may have been committed by the firſt witneſs, the other Genoeſe ſailor, namely Solari. Now, Gentlemen, with reſpect to that, certainly there is no evidence of it, nor any circumſtance to induce the leaſt ſuſpicion in the world that he had any thing to do with it: now, upon the review of this evidence, there are ſome things which are moſt perfectly clear, and which are not, nor can be, controverted; namely, that this man has loſt his life, that he loſt his life by the hand of violence: for it is not here poſſibly to be preſumed, no force of imagination can be equal to the preſumption, that this man would put himſelf to death: the act of violence was committed, by the blood which appeared in the highway, at a conſiderable diſtance from where the dead corpſe was afterwards found depoſited; and the appearance of the field over which it was dragged leaves no doubt but that, by the act of man, that body had been removed; therefore you have here what is called the *corpus criminis*; the exiſtence of the crime is beyond all doubt: but that being proved ever ſo clearly, it does not follow, as a neceſſary conſequence, that that crime is to be imputed to any particular individual, or to any body of men; that one is to learn from the circumſtances. Now, as to the time at which it was committed; it certainly was on the Sunday; it was on that day when the unhappy man had in company of theſe three men, about five in the morning, left the public-houſe at Staines; they then left it apparently, as the landlord tells you, to proceed on their journey to London: about ſix that morning, theſe three men are found near four miles from Staines, the fourth man not making part of the company; and the body was about three hundred yards further advanced on the road to London. Gentlemen, that is the important criſis of time in this cauſe: what became of that man who had ſet out with them, (and whoſe body was found dead that ſame morning, not above three hundred yards from the place) at the time they were met by the other witneſs, is undoubtedly, to ſay no more of it, an important circumſtance: the weight which belongs to it, it is for you in your judgments to give it: you will draw from it that fair, neceſſary reſult, which your minds muſt be impelled one way or the other to draw; for if you are not impelled to draw concluſions unfavourable to the priſoners, you will not conjecture merely; but it is not neceſſary that the hand only which gave the blow ſhould be conſidered as the murderer; becauſe, if more people are concerned, aiding, abetting, and comforting, they all of them contribute to fortify the mind of the man who gives

gives the blow; all of them are included in the ſame degree of guilt; all of them in the eye of the law, and of common ſenſe and morality too, all of them are undoubtedly murderers. Gentlemen, if you could in this caſe diſcriminate one of the priſoners at the bar from the other, you would be glad to do it, becauſe it is on the merciful ſide. There are other circumſtances which it is for you to judge, it is for me only to preſent them to your judgement, how they affect either of the priſoners; for on each of them you will recollect ſome part of that property which appears to have belonged to the deceaſed, and ſome part of that property ſo marked as to induce at leaſt ſuſpicion of guilt, was in the cuſtody of the priſoners; the bloody trowſers on one, the hat on another, the relique on another; this I think is the whole of the caſe: with you, Gentlemen, are the iſſues of life and death, with reſpect to theſe three men. I only recall to your recollection, that though the ſituation you are placed in is undoubtedly an anxious one, and diſtreſſing to feeling minds; yet it is a ſituation, in which by the conſtitution of the country you are placed: you have a great debt of humanity and juſtice to diſcharge, both with reſpect to the priſoners, and with reſpect to your country: no ſociety can exiſt, no man is ſafe, if thoſe who are plainly guilty elude the purſuit of puniſhment: you are not to thirſt after blood, and to follow a man to his death, on ſlight ſuſpicions, nor otherwiſe than on ſtrong and pregnant circumſtances; and if in your opinion, on thoſe circumſtances, though there were no witneſſes preſent, yet if there are ſtrong and pregnant circumſtances which leave no doubt on your minds to whom to impute this murder (which undoubtedly was committed by ſomebody), then you will diſcharge your duty by ſaying they are guilty: but if, after deliberating on the whole of the caſe, you are not ſatisfied, then you will be glad to find the priſoners not guilty.

Priſoner Murrini. The blood on our trowſers was in conſequence of having killed two pigs the day before we came on ſhore.

JACINTHO PHARARO, }
ANTHONI MURRINI, } Guilty.
STEPHEN APOLOGIE, }

Mr. RECORDER immediately paſſed ſentence to be executed on the Monday following, and afterwards to be diſſected and anatomiſed; which was executed accordingly.

An

An Argument in Defence of the Legality of impreſſing for the Sea-Service, by Sir MICHAEL FOSTER, *then Recorder of Briſtol, afterwards one of the Judges of the King's Bench.*

The Caſe of ALEXANDER BROADFOOT.

At the gaol delivery held for the city and county of the city of Briſtol, Auguſt 30, 1743, Alexander Broadfoot was indicted for the murder of Cornelius Calahan, a ſailor belonging to his majeſty's ſhip the Mortar ſloop.

The caſe was thus: captain Hanway, commander of the Mortar ſloop, had a warrant from the lords of the admiralty, grounded on an order of his majeſty in council, impowering him to impreſs, or cauſe to be impreſſed, ſeamen for his majeſty's ſervice. The warrant expreſsly directeth, "That "the captain ſhall not intruſt any perſon with the execution "of it, but a commiſſion officer; and ſhall inſert the name "and office of the perſon intruſted on the back of the war-"rant."

The lieutenant of the Mortar ſloop (the only commiſſion officer on board beſides the captain), was deputed by him to impreſs according to the tenor of the warrant.

On the 25th of April laſt, captain Hanway being at anchor in Kingroad, within the port and county of Briſtol, ordered the ſhip's boat down the channel in order to preſs as they ſhould ſee opportunity. But the lieutenant ſtaid in Kingroad on board with the captain.

Towards evening the boat came up with a merchant-man, the Bremen factor, homeward-bound, and ſome of the crew went on board in order to preſs; who being informed that one or two of the Bremen's men were concealed in the hold, Calahan, with three others of the boats crew, went thither in ſearch of them. Whereupon Broadfoot, one of the Bremen's men (who had before provided himſelf with a blunderbuſs and piſtols for his defence againſt the preſs-gang), called out and aſked them what they came for: he was anſwered by ſome of the preſs-gang, "We come for you and "your comrades." Whereupon he cried out, "Keep back, "I have a blunderbuſs loaded with ſwan-ſhot." Upon this the others ſtopped, but did not retire. He then cried out, "Where is your lieutenant?" and being anſwered, "He "is not far off," immediately fired among them. By this

ſhot

ſhot Calahan was killed on the ſpot, and one or two more of the preſs-gang wounded.

The caſe being thus, the Recorder, Mr. ſerjeant [afterwards judge] Foſter, was of opinion, that the boat's crew having been ſent out with a *general order to impreſs as they ſhould ſee opportunity*, and having, in purſuance of that order, boarded the veſſel without a proper officer, expreſsly againſt the terms of the captain's warrant, every thing they did was to be looked upon as an attempt upon the liberty of the perſons concerned, without any legal warrant: and he accordingly directed the jury to find Broadfoot guilty of manſlaughter. But this being a caſe of great expectation, and uncommon pains having been taken to poſſeſs people with an opinion that preſſing for the ſea-ſervice is a violation of Magna Charta, and a very high invaſion of the liberty of the ſubject, the recorder thought proper to deliver his opinion touching the legality of preſſing for the ſea-ſervice, provided the perſons impreſſed are proper objects of the law, and thoſe employed in that ſervice come armed with a proper warrant for that purpoſe.

The RECORDER'S [FOSTER'S] *Argument.*

This queſtion, touching the legality of preſſing mariners for the public ſervice, is a point of very great and national importance. On one hand, a very uſeful body of men ſeem to be put under hardſhips inconſiſtent with the temper and genius of a free government. On the other, the neceſſity of the caſe ſeemeth to entitle the public to the ſervice of this body of men, whenever the ſafety of the whole calleth for it.

Before I ſpeak directly to the point, it will be neceſſary to throw out of the caſe every thing which does not enter into the merits of the preſent queſtion.

We are not, at preſent, concerned to enquire, whether perſons may be legally preſſed into the land-ſervice, nor whether land-men may be legally preſſed into the ſea-ſervice. The preſent queſtion, I ſay, is not whether people may be taken from their lawful occupations at home, and ſent againſt their wills into a remote and dangerous ſervice; into a ſervice that they are utterly unacquainted with, and poſſibly unfit for. No, the only queſtion at preſent is, whether mariners, perſons who have freely choſen a ſea-faring life, perſons whoſe education and employment have fitted them

them for the ſervice, and inured them to it, whether ſuch perſons may not be legally preſſed into the ſervice of the crown, whenever the public ſafety requireth it, *Ne quid detrimenti Reſpublica capiat?*

For my part I think they may. I think the Crown hath a right to command the ſervice of theſe people, whenever the public ſafety calleth for it. The ſame right that it hath to require the perſonal ſervice of every man able to bear arms in caſe of a ſudden invaſion or formidable inſurrection. The right in both caſes is founded on one and the ſame principle, the neceſſity of the caſe, in order to the preſervation of the whole.

It would be time very ill-ſpent to go about to prove that this nation can never be long in a ſtate of ſafety, our coaſt defended, and our trade protected, without a naval force equal to all the emergencies that may happen. And how can we be ſecure of ſuch a force? The keeping up the ſame naval force in time of peace, which will be abſolutely neceſſary for our ſecurity in time of war, would be an abſurd, a fruitleſs, and a ruinous expence.

The only courſe then left is, for the crown to employ, upon emergent occaſions, the mariners bred up in the merchants ſervice.

By this means the trade of the nation becometh a nurſery for her navy; and the merchant, while he is increaſing the wealth of the kingdom, is at the ſame time training up the mariner for its defence.

And as for the mariner himſelf, he, when taken into the ſervice of the crown, only changeth maſters for a time: his ſervice and employment continue the very ſame, with this advantage, that the dangers of the ſea and enemy are not ſo great in the ſervice of the crown, as in that of the merchant.

I am very ſenſible of the hardſhip the ſailor ſuffereth from an impreſs in ſome particular caſes, eſpecially if preſſed homeward-bound after a long voyage. But the merchants who hear me, know that an impreſs on outward-bound veſſels would be attended with much greater inconveniencies to the trade of the kingdom; and yet that too is ſometimes neceſſary. But where two evils preſent, a wiſe adminiſtration, if there be room for an option, will chooſe the leaſt.

War itſelf is a great evil, but it is choſen to avoid a greater. The practice of preſſing is one of the miſchiefs war bringeth with it. But it is a maxim in law, and good policy too, that all private miſchiefs muſt be borne with patience

ence for preventing a national calamity. And as no greater calamity can befall us than to be weak and defenceleſs at ſea in a time of war, ſo I do not know that the wiſdom of the nation hath hitherto found out any method of manning our navy, leſs inconvenient than preſſing, and at the ſame time equally ſure and effectual.

The expedient of a voluntary regiſter, which was attempted in king William's time, had no effect.

And ſome late ſchemes I have ſeen appear to me more inconvenient to the mariner, and more inconſiſtent with the principles of liberty, than the practice of preſſing: and, what is ſtill worſe, they are, in my opinion, totally impracticable.

Thus much I thought proper to ſay upon the foot of reaſon and public utility, before I come to ſpeak directly to the point of law: which I ſhall now do.

According to my preſent apprehenſion (and I have taken ſome pains to inform myſelf,) the right of impreſſing mariners for the public ſervice, is a prerogative inherent in the crown, *grounded upon common-law, and recognized by many acts of parliament.*

A general immemorial uſage, not inconſiſtent with any ſtatute, eſpecially if it be the reſult of evident neceſſity, and withal tendeth to the public ſafety, is, I apprehend, part of the common law of England. If not, I am at a loſs to know what is meant by common law, in contradiſtinction to ſtatute-law. And therefore it is a great miſtake in this caſe, as indeed it would be in any other, to conclude that there is no law, becauſe perhaps there may be no ſtatute that expreſsly and in terms impowereth the crown to preſs. For the rights of the crown, and the liberties of the ſubject too, ſtand principally upon the foot of common law; though both have been in many caſes confirmed, explained, or aſcertained by particular ſtatutes.

As to the point of uſage in the matter of preſſing, I have met with a multitude of commiſſions and mandatory writs to that purpoſe, conceived in various forms; and from time to time directed to different officers, as the nature of the ſervice required.

It would be tedious for me to cite one half of them; but I will endeavour to range them under ſome general heads, and then cite a few.

Some are for preſſing ſhips.
Others for preſſing mariners.
And others for preſſing ſhips and mariners.

In ſome, the parties to whom they are directed are required to make a general impreſs upon certain great and emergent occaſions.

In others, they are confined to a certain number of ſhips and mariners for ſpecial ſervices.

And in others, they are ſtill further confined to certain places on the coaſt.

Some commiſſioners, particularly thoſe conferring the admiralty juriſdiction and the rights of admiralty, warrant an impreſs as often as there ſhall be occaſion.

Others impower commanders of fleets or ſquadrons intended for certain expeditions, to preſs for that particular ſervice.

And others impower maſters of particular ſhips to preſs for manning their reſpective veſſels.

This general view will be ſufficient to let us into the nature of theſe precedents. And though the affair of preſſing ſhips is not now before me, yet I could not well avoid mentioning it; becauſe many of the precedents I have met with and muſt cite, go as well to that, as to the buſineſs of preſſing mariners. And taken together, they ſerve to ſhew the power the crown hath conſtantly exerciſed over the whole naval force of the kingdom, as well ſhipping as mariners, whenever the public ſervice required it.

This however muſt be obſerved, that no man ſerved the crown in either caſe at his own expence, maſters and mariners received full wages, and owners were conſtantly paid a full freight. But whether the pay in either caſe commenced from the time of preſſing, or from the time of actual entry into the ſervice, is not ſo clear.

There is in Cotton's Records a note of a petition of the Commons, and the King's anſwer upon this ſubject, in the 47 *Ed.* III. which inclineth me to think the latter was the caſe. The petition as abridged by Cotton is thus: "That "maſters of ſhips may be paid the wages of them and their "mariners from the day of their being appointed to ſerve "the king." The anſwer is, "That taking of ſhips ſhall "not be but for neceſſity, and payment ſhall be reaſonable "as heretofore."

In the ſame parliament an attempt was made to obtain for owners of ſhips an allowance for wear and tear in the king's ſervice.

The petition is thus abridged, "The maſters of ſhips re-"quire an allowance for the tackling of their ſhips worn by "the King's ſervice."

The

The anſwer is, " Such allowance hath been heretofore " made."

In the 2d *Ric.* II. an attempt of the like kind was made and with the like ſucceſs. The petition is, " That owners " of ſhips taken up for the King's ſervice, for their loſſes in " the ſame may be conſidered; and that mariners may have " the like wages, as archers have." The anſwer is, " It " ſhall be as hath been uſed.

Theſe petitions, though ſtyled in the Record the petitions of the Commons as having probably begun in that houſe, were really the acts of both Houſes; otherwiſe they could not have been offered to the King in a parliamentary way. For the antient method of paſſing bills was, that the matter of the bill was tendered to the Crown for the Royal Aſſent by both Houſes in form of petitions. And according to the anſwers from the throne they paſſed into laws or were rejected.

I cannot but obſerve, that when we ſee every branch of the Legiſlature ſpeaking of the ſubject of preſſing in the manner they do in theſe petitions and anſwers, it is not eaſy to conceive that the legality of the practice was then queſtioned. 'Tis plain at leaſt, that it was in thoſe early times treated in parliament as antient and well-known uſage.

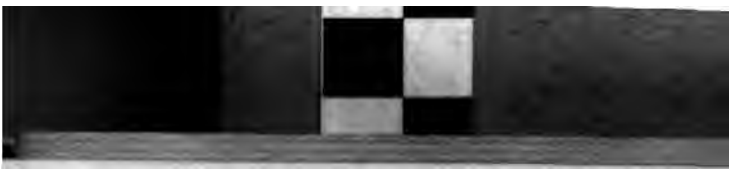
I come now to the commiſſions and mandatory writs I ſpoke of. I will cite a few from Rymer's Fœdera, out of a great number of the like kind which may be met with in that valuable collection of publick records.

William Barret commander of the ſhip Julian had a commiſſion 29 *Ed.* III. to make choice of and take up in the counties of Kent, Eſſex, Surrey, and Suſſex, as well within liberties as without, 36 mariners, and put them on board his ſhip, in order to proceed with the Prince of Wales on an expedition to Gaſcony.

The like commiſſions were given at the ſame time to the commanders of ſeven other ſhips for manning their reſpective veſſels for the ſame ſervice.

There is a commiſſion to John Orewell one of the King's Serjeants at arms to arreſt and take up 60 able mariners in the Thames and Medway and parts adjacent, as well within liberties as without, and to cauſe them to be at Sandwich within 15 days for the King's ſervice.

John Elingham, a ſerjeant at arms, is impowered 15 *Ric.* II. to arreſt and take up in the counties of Somerſet, Briſtol, Devon and Cornwall, and in South Wales, as well within liberties as without, ſo many ſhips, barges, and other veſſels, and



and alſo mariners ſufficient for manning them, as ſhould be found ſufficient for an expedition to Ireland under the King's uncle the Duke of Glouceſter. And all ſheriffs, mayors, bailiffs, maſters of ſhips and mariners are required to be aſſiſting to him in that ſervice.

In the ſame year the like commiſſions iſſued to two other Serjeants at Arms for the ſame ſervice, in Wales, Ireland, Lancaſhire, and Cheſhire.

John Kingſton commander of the ſhip Katherine is commiſſioned by himſelf or deputies to arreſt and take up, as well within liberties as without, as many mariners as ſhould be neceſſary for manning his ſhip, and to put them on board for the King's ſervice. And all ſheriffs, mayors, &c. are required to be aſſiſting to him in that ſervice.

Commiſſions went at the ſame time to ſix commanders of other veſſels for manning their reſpective veſſels in the ſame manner, and for the ſame ſervice.

A mandatory writ iſſued (21 H. VI.) directed to Thomas Colledge, ſerjeant at arms, and to Ralph Ingolſby, and to the cuſtomers of the port of Sandwich, and of every port from thence to Southampton, requiring them to arreſt and take up for the King's ſervice all and ſingular ſhips, barges, and other veſſels capable of tranſporting men or horſes, of what burden ſoever; and alſo all maſters and mariners that could be found in any of the ports mentioned before, and to put the ſaid maſters and mariners on board the ſaid veſſels for an expedition to the dutchy of Aquitain; any Royal Letters of Licenſe thentofore granted to any perſon or perſons, or any other matter notwithſtanding: and all ſheriffs, mayors, and other officers, are required to be aſſiſting to them in that ſervice.

At the ſame time the like writs iſſued to the cuſtomers and other officers of almoſt all the port-towns in the kingdom.

There is a commiſſion 14 *Ed.* IV. to the maſter and purſer of the Mary Grace impowering them to arreſt and take up, as well within liberties as without, whereſoever they could be found, as many mariners as ſhould be ſufficient for manning their veſſel, and to put them on board at the King's wages and for his ſervice.

At the ſame time the like commiſſions iſſued to four other maſters for manning their reſpective ſhips in the ſame manner.

The like commiſſions to maſters of ſix veſſels.

The like to eleven maſters in the ſame form.

I will now mention a few precedents of another ſort; which, becauſe they relate in great meaſure to one and the ſame ſervice, I will place together, to avoid as much as poſſible a needleſs repetition in matters of form.

Theſe are either ſpecial commiſſions for commanding fleets or ſquadrons intended for certain expeditions mentioned in the commiſſions; or the general commiſſions conferring the whole Admiralty Juriſdiction with the rights of Admiralty, whether to one perſon under the Style of High Admiral or to two under the character of Admirals of the North and Weſt. Which latter was the uſual manner of conferring the Admiralty Juriſdiction before the office of Lord High Admiral of England came much in uſe.

As to the ſpecial commiſſions, 5 *Hen.* V. Sir William Bardolph was appointed admiral of a fleet then intended to be fitted out; his commiſſion impowereth him among other things to make choice of and take up for the King's ſervice a ſufficient number of mariners and others, and to put them on board the fleet, and to puniſh and chaſtiſe ſuch mariners who ſhould be diſobedient or refractory in that reſpect.

The Lord Willoughby de Broke was appointed 5 *Hen.* VII. commander in chief of the fleet and army then intended for an expedition to France; he hath the ſame powers with regard to the manning the fleet as Sir William Bardolph had.

Sir Robert Poyntz is appointed 8 *Hen.* VII. to command the fleet in the abſence of the Lord Willoughby, and hath the ſame powers with regard to the manning the fleet.

Sir Martin Frobiſher had a commiſſion, 31 *Eliz.* which, after reciting that the command of a ſmall ſquadron intended againſt the Spaniards in the Weſt Indies had been given to him, goeth on thus: "We therefore let you, to wit, that we "have authorized and appointed, and do by theſe preſents "give full power and authority to the ſaid Sir Martin Fro- "biſher, or to his ſufficient deputy or deputies whereſoever "he ſhall have need, to preſs and take up for our ſervice to "the furniture of ſuch ſhips as ſhall be committed to his "charge in any place upon our coaſts of England or Ireland, "any mariners, ſoldiers, gunners or other needful artificers." And then requireth all Juſtices and other officers to be aſſiſting to him in the premiſes.

I would not be underſtood to ſay, that all commanders of fleets or ſquadrons for ſpecial ſervices have had the ſame powers as thoſe I have mentioned. The truth is, the greater number of theſe ſpecial commiſſions, which I have

met

met with, and thoſe too of the lateſt date, are ſilent as to that point.

I come now to the general commiſſions conferring the whole Admiralty Juriſdiction and the Rights of Admiralty.

And thoſe I have met with, though I apprehend they all agree in ſubſtance with regard to the preſent queſtion, yet differ a little in point of form.

In the 10th *Ed.* III. and in the 12th of the ſame reign, the Admirals (for at that time there were two, one for the North, the other for the Weſt) are impowered to make choice of, as well within liberties as without, able-bodied men fit for the ſervice, and to put them on board the fleet. The word *eligendi* made uſe of in theſe commiſſions, is the word uſed to the ſame purpoſe about that time in all the commiſſions for preſſing for the land-ſervice, which was then likewiſe practiſed. You have the word in relation to the land-ſervice in the ſtatute of the 18 *Ed.* III. "Men at arms, "hoblers, and archers choſen to go into the King's ſervice "out of the realm, ſhall be at the King's wages from the "day they depart out of the counties where they were choſen "'till their return."

In the 50th *Ed.* III. the Admirals commiſſions with regard to this matter ran thus: "Nec non naves & naviculas "guerinas, quot neceſſariæ, cujuſcunque portagii fuerint "quoties neceſſa fuerit, congregandi: & marinarios & alios "pro navibus & naviculis illis neceſſarios eligendi, capi-"endi, & in eiſdem ponendi, & hujuſmodi marinarios qui "rebelles & contrarientes fuerint in hac parte, debitè com-"peſcendi & caſtigandi: & ad omnia alia quæ ad officium "Admiralli pertinent IN HAC PARTE faciendi & exer-"cendi; prout de jure & ſecundum legem maritimam fuerit "faciendum."

And all Sheriffs, Mayors, Bailiffs, Miniſters, Owners of Ships, Maſters and Mariners are required to be aiding and aſſiſting to them in the premiſes.

The Admirals Commiſſions run exactly in the ſame form.

So doth Thomas of Lancaſter's Commiſſion of High Admiral.

So doth the Earl of Warwick's Commiſſion of High Admiral.

And ſo doth the Duke of Richmond's, 17 *Hen.* VIII.

The Lord Seymour's Commiſſion of High Admiral expreſſeth the matter a little differently; the words are, "Ac

" ad nautas & marinarios & alios pro omnibus & ſingulis " navibus, conducendum & gubernandum neceſſarios, eli- " gendum, capiendum & apprehendendum, atque eoſdem in " dictis navibus & naviculis ponendum & retinendum.

In the ſame year the Lord Seymour had another commiſſion in fuller terms, with all the Juriſdictions and Rights of Admiralty particularly enumerated and ſet forth at large; the words with regard to the preſent matter are, " Et " inſuper tam naves & naviculas guerinas quam quaſcunque " alias naves & naviculas ſeu vaſa quæcunque, pro quibuſ- " cunque viagiis, ſeu negotiis noſtris vel expeditione eorun- " dem; nec non navigeros, ſive pilotas ac navium magiſ- " tros, nautas, naucleros, vibreleatores, ſeu bombartitores " ac marinarios & alias perſonas quaſcunque, pro navibus, " naviculis ſeu vaſibus hujuſmodi aptos & idoneos, de tem- " pore in tempus quoties neceſſe fuerit, ubicunque locorum " infra regna & dominia noſtra prædicta tam infra libertates " quam extra, congregandum, deligendum, retinendum, ca- " piendum, arreſtandum, deputandum & aſſignandum abſque " interruptione ſeu impedimento per quemcunque in contra- " rium, fiendo; cum plenâ Juriſdictione & poteſtate ad exe- " quendum omnia & ſingula quæ in hac parte per magnum " Admirallum noſtrum & præfectum generalem claſſis & " marium, jure fieri debent, poſſint, vel ſolent."

The Earl of Warwick had a Commiſſion 3 *Ed.* VI. of High Admiral in the ſame form.

And ſo had the Duke of Buckingham, 16. *Jac.* I.

And now, when I conſider theſe precedents not fetched from dark, remote, and unſettled times, but running uniformly through a courſe of many ages, all, as I conceive, ſpeaking to the ſame purpoſe, though in different forms of expreſſion; ſome for making choice of, others, and thoſe the much greater number, and of the lateſt date, for making choice of and taking up, or for arreſting, preſſing, and taking up, mariners, and putting them on board for the publick ſervice: when I conſider theſe precedents with the practice down to the preſent time, I cannot conceive otherwiſe of the point in queſtion, than that the Crown hath been always in poſſeſſion of the prerogative of preſſing mariners for the publick ſervice. Which prerogative hath been carried into execution, as well by virtue of ſpecial commiſſions iſſued as the exigency of affairs required, as by the perſons who from time to time have been intruſted with the whole Admiralty Juriſdiction.

And indeed, the words touching the manning the fleet, impowering the Admirals to do and execute all other matters and things touching that ſervice *which belong to the office*

of

of Admiral ſeem to imply, either that thoſe powers were deemed to be inherent in the office, or that they had been conſtantly by expreſs words in the commiſſions annexed to it.

To this purpoſe I will mention a very remarkable tranſaction in the Parliament of the 7th and 8th of *Hen.* IV.

Complaint was made in Parliament that the ſea-ſervice had been greatly neglected, and that depredations were daily committed. To remedy this evil, a very extraordinary expedient was offered, to which the neceſſity of the King's affairs obliged him, *for the preſent*, to ſubmit. It was, that the naval force of the kingdom ſhould, for a time, be put under the direction of the merchants themſelves.

Accordingly, an act paſſed that the merchants ſhould have the keeping of the ſeas from the 1ſt of May, 1406, to Michaelmas, 1407. And to defray the expence of this ſervice they were to be entitled, by Writs of Privy Seal, to certain duties mentioned in the record, as I find it abridged by Cotton.

Among other proviſions touching this matter, it was enacted that the merchants ſhould name two perſons, one for the North and the other for the South, who, by commiſſion, ſhould have the like powers as other Admirals have had.

In purſuance of this act, Nicholas Blackbourn was named by the merchants for the North, and Richard Cliderow for the South.

One might reaſonably hope that no powers deemed illegal or oppreſſive, no powers hurtful to trade, or grievous to the mariners, ſhould be inſerted in the commiſſions of Admirals nominated by the merchants. But it happeneth that Blackbourn's commiſſion is extant, and runneth in the very words of thoſe I have cited from the 50th of *Ed.*III. to the 17th of *Hen.* VIII.

You have it in Rymer (8. 439). It reciteth the Act of Parliament, and that Blackbourn had been nominated by the merchants for the North; and then goeth on in the uſual form, impowering him to make choice of, take up, and put on board, ſuch mariners and others as ſhall be found neceſſary for the ſervice, and to puniſh and chaſtiſe ſuch as ſhall be diſobedient and refractory in that behalf.

The commiſſion was to continue as long as the merchants ſhould have the keeping of the ſeas, which indeed was not long. For before that Parliament roſe, this novelty came to an end: the merchants were eaſed of a ſervice they were found to be very unequal to, their Admirals commiſſions dropped

dropped, and the whole direction of the marine returned to its proper channel.

I think it may ſafely be inferred from this record that in the judgment of thoſe times, and in a concern of the merchants themſelves, the practice of manning the navy by the methods mentioned in theſe commiſſions, was eſteemed to be neceſſary for the ſervice, and a branch of admiral juriſdiction.

I come now to the ſtatutes which ſpeak of this matter.

And I do admit that I know of no ſtatute now in force, which directly, and in expreſs terms, impowereth the Crown to impreſs mariners into the ſervice. And admitting that the prerogative is grounded on immemorial uſage, I know of no neceſſity for any ſuch ſtatute. For let it be remembered, that a prerogative grounded upon general immemorial uſage not inconſiſtent with any ſtatute, not repugnant to the publick utility, is as much part of the law of England, as ſtatute law. You will be pleaſed to carry this obſervation too along with you, that the ſtatutes which mention preſſing as a practice then ſubſiſting and not diſallowed, are at leaſt an evidence of the uſage if they go no further. I mean if they do not amount to a tacit approbation of it.

For it is hard to conceive, that the Legiſlature ſhould frequently mention a practice utterly illegal, and repugnant to the principles of the Conſtitution as ſubſiſting, without ſome mark of diſapprobation.

The firſt ſtatute I have met with is that of the 2 R. 2, cap. 4. It is an act againſt Mariners deſerting the ſervice; not to be met with in the latter editions of the Statutes at Large, which give us only the title of this Act, with a note that is altered by the 18th *Hen.* VI. and 5 *Eliz.*

It is however ſtill in force, and as ſuch is inſerted by Raſtal in his Abridgment under title "Mariner, No 1." My worthy friend Mr. Cay hath likewiſe inſerted it in his Abridgment, under title "Seamen, No 1." I will give you the words of the Act as far as concerneth this point, as I find it in an edition of the Statutes at Large, ending with the laſt year of *Hen.* VII. "*Item*, becauſe that divers mariners after they be arreſted and retained for the King's ſervice upon the ſea, in defence of the realm, and thereof have received their wages, do flee out of the ſaid ſervice without licenſe of the Admirals or their Lieutenants.—it is ordained and eſtabliſhed that all thoſe mariners which from henceforth ſhall do in ſuch manner—ſhall be holden to reſtore to our ſaid Sovereign Lord the King the double of that they have taken for wages, and nevertheleſs ſhall

"be

" have one year's impriſonment, without being delivered by "mainpriſe, bail, or by any other way."

The Act then goeth on to direct how fugitive mariners ſhall be apprehended and dealt with; and concludeth with this clauſe, " The like puniſhment ſhall be made of Ser-" jeants of Arms, Maſters of Ships, and all others that ſhall " be attainted before the Admiral or his Lieutenant afore-" ſaid, that they have any thing taken of the ſaid mariners " for to ſuffer them to go at large out of the ſaid ſervice, " after they have been arreſted for the ſame ſervice."

You will be pleaſed to obſerve that the word *arreſt* twice uſed in this Act, is made uſe of in the precedents I cited of the 1ſt and 15th of this very reign, and in moſt of thoſe of latter date: it is likewiſe uſed in ten other commiſſions in the ſame reign touching this very ſervice, all likewiſe directed for execution to Serjeants at Arms, which for brevity's ſake I have omitted.

So that if it be aſked who are the perſons ſubjected to the penalties of this Act, it muſt be anſwered, mariners arreſted and taken into the ſervice by virtue of commiſſions from the Crown, in caſe of their deſertion, and Serjeants at Arms, maſters of ſhips, and others executing ſuch commiſſions, who for lucre ſhall ſuffer them to go at large after ſuch arreſts.

Mariners indeed were not ſubject to the penalties of this Act, unleſs they had received wages. But might not a mariner ſo arreſted have reaſonably ſaid, I was compelled againſt law into the ſervice; I did my duty while I continued in it, and dearly earned the wages I received? Might not a mariner have ſaid this, and much more, upon a ſuppoſition of the illegality of an impreſs? Certainly he might. But you ſee mariners, though taken into the ſervice by compulſion, are by this Act made liable to pecuniary and corporal puniſhment too in caſe of deſertion. This doth more than imply the legality of ſuch compulſion.

It may poſſibly be objected that the word *retained* is uſed in the Act, and that a retainer implieth a mutual contract for ſome ſervice to be done. It may, when it ſtandeth alone, have received that ſenſe in modern language, but in ſtrict propriety it meaneth nothing more than the taking a perſon into ſome ſervice; and is in truth the Act only of the perſon retaining or taking. And therefore when I ſee the word *retained*, connected with one which hath no other meaning in the Engliſh tongue than what carrieth with it the idea of compulſion, I cannot conceive that the Legiſ-

lature,

lature, ſpeaking of perſons *arreſted* and *maintained*, ſhould mean no other than perſons taken into the ſervice with their own conſent.

That there was a practiſe then ſubſiſting of taking mariners into the ſervice by compulſion, cannot be denied: the Parliament could not be ignorant of it. Is it poſſible then to imagine, that they could uſe a word which manifeſtly ſignifieth compulſion, and yet mean nothing more than a mutual contract? Beſides, it cannot be conceived that Serjeants at Arms, who, as I before obſerved, were the perſons about that time uſually employed in the ſervice of preſſing, could be expreſsly, and by name, ſubjected to the penalties of the Act, if no mariners but ſuch as voluntarily entered into the ſervice, were comprehended in it.

The next Act is that of the 2d and 3d *Ph.* and *Mar.* which layeth a penalty on watermen plying between Graveſend and Windſor, who, to ſpeak in the language of the Act, "in "the time of preſſing by commiſſion for the ſervice of the "Crown upon the ſea, do willingly and obſtinately withdraw, hide, and convey themſelves into ſecret places and "out-corners; and after ſuch time of preſſing is over-paſſed, "return to their employments."

This proviſion, 'tis true, extendeth only to watermen on the Thames, and may be conſidered as one of the many wholeſome regulations thoſe perſons are brought under by this Act. And it is mentioned in that light in an Act paſſed in the late Queen's time. But, at the ſame time, it ſheweth that commiſſions for preſſing were then in uſe. And, in my opinion, it likewiſe ſuppoſeth the legality and utility of ſuch commiſſions, and that theſe people are the objects of them. Otherwiſe why are they ſubjected even to the ſlighteſt puniſhment, for abſconding at the time of the execution of thoſe commiſſions.

The Acts which come next to be conſidered are ſome made ſince the Revolution; a moſt auſpicious period! when the principles of Liberty were well underſtood, and moſt gloriouſly aſſerted.

There are the 7th and 8th of King *William*, the 2nd, 3d, 4th, and 5th of the late Queen.

The firſt is intituled, "An Act for the Increaſe and Encouragement of Seamen."

It enacteth, among other things, that licenſes may be given by his Majeſty, or the Lord High Admiral, or Commiſſioners of Admiralty to any landmen willing to enter into the merchants ſervice: which ſhall be a protection to them againſt being impreſſed for the ſpace of two years.

Pro-

Provided ſuch landmen bring two credible perſons to vouch for them. But if any perſon ſhall vouch for any one as a landman, who ſhall afterwards appear to have been a ſeaman, he ſhall forfeit twenty pounds.

The 2d and 3d of the late queen is intituled "An act for "the Increaſe and better encouragement of Navigation and "Security of the Coal Trade." To theſe ends it impowereth pariſh officers to bind out poor boys to ſea in the merchants' ſervice: and enacted that boys, ſo bound out, ſhall not be compelled, or *impreſſed*, or permitted to enter into the ſervice of the Crown at ſea 'till they attain their age of eighteen; and that certificates of ſuch binding ſhall be tranſmitted by the collectors of the reſpective ports to the Admiralty; and that thereupon protections ſhall be made for ſuch apprentices without fee or reward.

And for encouraging other perſons to bind themſelves apprentices in the merchants' ſervice, it further enacteth, that perſons ſo binding themſelves ſhall not be compelled or impreſſed into the ſervice of the Crown for three years from the time of ſuch binding; and that upon certificates of ſuch binding, from the collectors of the reſpective ports, the Admiralty ſhall grant protections without fee or reward.

And, for encouraging the coal-trade, it further enacteth, that, during the war, there ſhall be allowed to every veſſel employed in that trade, beſides the maſter, mate, and carpenter, one able ſeaman for every one hundred ton of the veſſel, not exceeding three hundred ton, free from impreſſing.

The 4th and 5th of the late Queen reciteth that clauſe in the Act of the 2d and 3d, which exempted voluntary apprentices for three years; and ſaith, "Whereas ſuch ex-"emption for three years, which was intended for the en-"couragement of landmen to bind themſelves, hath been "manifeſtly abuſed for the exempting and protecting of "ſeamen from the ſervice, to the great hindrance and preju-"dice of her Majeſty's ſea-ſervice;" therefore be it enacted "and declared, that no perſon or perſons, of the age of "eighteen years, ſhall have any exemption or protection "from her Majeſty's ſea-ſervice, who ſhall have been in "any ſea-ſervice before the time they ſo bound themſelves, "any law or ſtatute to the contrary notwithſtanding." See alſo 1 *Annæ*, Seſſ. 1. cap. 16. § 2. 6. *Annæ*, cap. 31. § 2. 13 *Geo.* II. cap. 17. § 1, 2, 3, and cap. 28. § 5.

Let us now take a ſhort view of theſe Acts.

Perſons

Perſons under certain ſpecial qualifications are exempted from being impreſſed.

To that end, in one caſe, licences are to be granted by his Majeſty, or from the Admiralty, but under proper caution to prevent abuſes.

In other caſes, certificates are to be returned from the chief officers of the ports, and protections thereupon granted without fee or reward.

And, in every caſe, theſe exemptions, as they are confined to perſons under certain limited qualifications, ſo are they limited too in point of time, and withal given by way of encouragement. And, laſtly, the extending the benefit, even of a temporary exemption beyond the original intent of the Legiſlature, is declared to be an abuſe, and an abuſe tending to the great hindrance and prejudice of her Majeſty's ſea-ſervice.

Do not theſe things inconteſtibly preſuppoſe the expediency, the neceſſity, and the legality of an impreſs in general? If they do not, one muſt entertain an opinion of the Legiſlature acting and ſpeaking in this manner, which it will not be decent for me to mention in this place.

For the very notion of an exemption when granted by ſtatute to particular perſons, and this too by way of encouragement, implieth, that without ſuch exemption the parties entitled to the benefit of it would by law be liable to the duty or burden which is the ſubject-matter of that exemption: otherwiſe the ſtatute doth nothing, it operateth upon nothing, if no legal duty or burden be removed by it. And conſequently the granting exemptions to ſeamen under certain limited qualifications, and for a limited time only, ſuppoſeth that all ſeamen in general, without ſuch exemption, were by law liable to the duty or burden which is the ſubject-matter of that exemption.

And the many proviſions the Legiſlature hath made to prevent abuſes with regard to theſe exemptions, attended with a plain, full, and expreſs declaration, that ſuch abuſes, namely, the extending the benefit of exemptions beyond the intent of the Legiſlature, tend to the great hindrance and prejudice of the ſea-ſervice, imply, that the duty or burden, which is the object of all this care and caution, is expedient and neceſſary to the ſervice.

And this burden is plainly an impreſs in time of war.

Which from the authorities I have cited appeareth to me to be grounded on common and ſtatute-law. In other words, upon a general immemorial uſage, allowed, approved, and recognized by many acts of Parliament.

Againſt

Againſt what I have ſaid, it hath been objected, that the practice of preſſing is inconſiſtent with the liberty of the ſubject, and a breach of *Magna Charta*.

I readily admit that an impreſs is a reſtraint upon the natural liberty of thoſe who are liable to it. But it muſt likewiſe be admitted, on the other hand, that every reſtraint upon natural liberty is not *eo nomine* illegal, or at all inconſiſtent with the principles of civil liberty. And if the reſtraint, be it to what degree ſoever, appeareth to be neceſſary to the good and welfare of the whole, and to be warranted by ſtatute-law, as well as immemorial uſage, it cannot be complained of otherwiſe than as a private miſchief; which as I ſaid at the beginning muſt, under all Governments whatſoever, be ſubmitted to, for avoiding a public inconvenience.

As to *Magna Charta*, it is not pretended that the practice of preſſing mariners for the public ſervice is condemned by expreſs words in that ſtatute. And if it be warranted by common and ſtatute-law, it cannot be ſhewn to be illegal by any conſequences drawn from *Magna Charta*. In like manner as preſſing for the land ſervice could not be deemed illegal, or inconſiſtent with the principles of our conſtitution, while there were temporary acts (as there were many in the late war) to warrant it.

Beſides, we know that *Magna Charta* hath been expreſsly and by name confirmed by many acts of Parliament, my Lord Coke ſaith 32. And yet the practice of preſſing mariners ſtill continued through all ages, and was never, that I know of, once mentioned in any of thoſe acts as illegal, or a violation of the great charter.

In a ſimilar caſe, I mean the practice of preſſing ſoldiers for foreign ſervice, there are ſtatutes of an early date (1 Ed. III. 5, 25 Ed. III. 8.) which, I conceive, were intended againſt it; though it was practiſed long afterwards. But thoſe acts extend only to the caſe of preſſing for the land-ſervice, not a word do I find in them touching the ſea-ſervice. One reaſon of the difference, among others, may be that the land-ſervice was thought to be ſufficiently provided for in ordinary caſes by the military tenures: and extraordinary caſes, caſes of neceſſity, ſuch as that of a foreign invaſion, were expreſsly excepted. In thoſe caſes, ſaith the 1 Ed. III. "it ſhall be done as in times paſt;" which we know was by commiſſions of array. Whereas no competent proviſion was made by law for the ordinary ſea-ſervice. There were no naval ſervices due to the Crown, except thoſe of the Cinque Ports, and a very few others; which all together were too inconſiderable to be mentioned, and bore

bore no ſort of proportion to the common exigencies of the public in time of war.

But there is another objection which deſerveth to be conſidered. It is, that temporary acts have from time to time been made authorizing the preſſing mariners for the ſea-ſervice. From whence it is argued, that the Legiſlature, which is ſuppoſed to do nothing in vain, would not have given thoſe powers for a time, if the King, by his prerogative, could have provided for the ſervice without the aid of ſuch temporary acts.

The gentleman who had the care of publiſhing Lord Chief Juſtice Hale's Hiſtory of the Pleas of the Crown, referreth to ſeveral temporary acts made in the late Queen's time, authoriſing, as he ſuppoſeth, the preſſing of ſoldiers and mariners. I have looked into all thoſe acts. They are ſolely for preſſing ſoldiers and marines. Not a ſingle word that concerneth the preſſing of mariners do I find in any one of them.

There was indeed an act made in that reign (4 & 5 Anne, c. 19.) for compelling mariners into the ſervice by methods which it was then thought the prerogative alone could not warrant. To that end it authorized and required Juſtices of the Peace, and other Magiſtrates, to cauſe privy ſearches to be made, from time to time, for mariners, who, as the act expreſſeth it, "did lie hid, withdraw, and conceal themſelves," and to deliver them when apprehended to conductors for the ſervice of the Crown. And conſtables and other officers were, by warrants from the Magiſtrates, to make privy ſearches by night, and were impowered to enter houſes, and open doors, in execution of ſuch warrants; and were required to give an account of their proceedings, from time to time, to the Magiſtrates, on oath; and, in caſe of negligence or remiſſneſs in the premiſes, were ſubjected to pecuniary puniſhments. This is the ſubſtance of the firſt nine ſections of the act; which ſections continuing in force only 'till the firſt of March, 1706, are not printed in the later editions of the Statutes at large.

But it cannot, I conceive, be inferred from the new powers given by this act, that an impreſs by commiſſion from the Crown, or by Admiralty-warrants, which was practiſed at that very time, was illegal. All that can be inferred is, that the ordinary methods then in uſe were found ineffectual: and therefore the Legiſlature had for that time recourſe to an extraordinary one, for compelling into the ſervice thoſe who could not be come at by the ordinary methods; thoſe, who, in the language of the act, "lay hid, withdrew

" withdrew, and concealed themſelves." And to that end, civil Magiſtrates and civil Officers are required and authorized to do what, in the judgment of the Legiſlature without the aid of that act, they could not have done, or at leaſt were not compellable to do.

And whoever readeth and conſidereth the 17th and 18th ſections of this Act, which I have already cited to another purpoſe, will hardly conceive, that That Parliament had any doubts concerning the legality of an impreſs by the ordinary methods of Law.

Indeed, the temporary Acts of the 16th and 17th *Car.* I. come directly to the point. They authorized an impreſs by Admiralty-warrants for a limited time. And had temporary Acts of that kind been frequent, or had the practice of preſſing been diſcontinued from the time of Charles the Firſt, unleſs when revived by ſubſequent temporary Acts, I think what hath been ſaid upon the root of antient precedents could, after all, have had very little weight. For I freely declare, that antient precedents alone, unleſs ſupported by modern practice, weigh very little with me in queſtions of this nature, I mean, in queſtions touching the prerogative. But we all know that the practice of preſſing by Admiralty-warrants hath continued now near a century, ſince the expiration of thoſe Acts of King Charles the Firſt, without one ſtatute of the like kind to authorize it.

Theſe Acts of King Charles the Firſt do indeed ſhew that the prerogative of preſſing mariners into the public ſervice was at that time doubted of. And whoever conſidereth the peculiar circumſtances of that time, when the prerogative had in too many inſtances been carried to great lengths, and when the nation was at the very eve of a civil war upon the ſubject of liberty and prerogative, and conſidereth withal that a naval force muſt in all events, as things then ſtood, be provided; whoever I ſay conſidereth theſe things will not wonder that the prerogative of preſſing mariners ſhould at that very critical time be called in queſtion; or that, in order to procure an univerſal ſubmiſſion to a meaſure neceſſary at that time, the authority of Parliament ſhould be called in, in aid of the prerogative.

There was a temporary Act made in this very ſeſſion for preſſing for the land-ſervice. It reciteth, that a rebellion was on foot in Ireland; and then declareth, almoſt in the words of 1 *Ed.* III. before cited, " that by Law no man is compellable to go out of his county to ſerve as a ſoldier, except in caſe of neceſſity of ſudden coming of ſtrange ene-

" mies

" mies into the kingdom, or except he was bound thereto by " tenure."

It is worth obſerving, that no ſuch declaration, ſaving the rights of the ſubject, is to be found in any of the Acts of this ſeſſion for preſſing mariners. And the different penning of theſe Acts made in the ſame ſeſſion, and touching caſes of ſo ſimilar a nature, ſtrongly intimateth, that the point was not, even at that critical time, thought equally clear in the one caſe as in the other. The ſame obſervation occurreth with regard to the different penning of all the Acts of the late Queen for preſſing ſoldiers and marines, and of that for preſſing mariners; the former declare that it was neceſſary at that time of war, that ſoldiers and marines ſhould be raiſed by the methods preſcribed in the Acts, " by common con- " ſent and grant in Parliament." Theſe are the words of the Act, and they are the very words made uſe of to the ſame purpoſe in the 25th *Ed.* III. already cited. The latter without any ſuch declaration barely impowereth and requireth magiſtrates and other peace-officers to make ſearch for and apprehend mariners, who then lay hid, withdrew, and concealed themſelves, and to ſend them into the ſervice.

Lord Chief Juſtice Hale, in his Hiſtory of the Pleas of the Crown, ſpeaking of the legality of preſſing, which he indeed ſeemeth to doubt of, ſaith, " He that looketh upon the Acts " enabling preſſing ſoldiers and mariners for foreign ſervice " upon or beyond the ſea, namely, 17 *Car.* c. 12. 25, 26. " may think thoſe times made ſome doubt of it. But of this," ſaith he; " I deliver no opinion."

That learned man, you ſee, carrieth the inference from theſe temporary Acts no further than to render the matter doubtful, and ſo he leaveth it. But had he lived to ſee the practice of preſſing mariners continue near a century longer, and eſpecially had he ſeen this practice treated by the Legiſlature in the manner the Acts made ſince the Revolution treat it, I think what was then but matter of doubt would have now appeared to him in a different light. I confeſs it doth ſo to me. For rights of every kind, which ſtand upon the foot of uſage, gradually receive new ſtrength in point of light and evidence from the continuance of that uſage; as it implieth the tacit conſent and approbation of every ſucceſſive age in which the uſage hath prevailed. But when the prerogative hath not only this tacit approbation of all ages, the preſent as well as the former, on its ſide, but is recognized or evidently preſuppoſed by many Acts of Parliament, as in the preſent caſe I think it is, I ſee no legal objection that can be made to it.



I make no apology for the length of my argument, becauſe I hope the importance of the queſtion will be thought a ſufficient excuſe for me in that reſpect. For it is no more nor leſs than, whether the only effectual method yet found out for manning our navy in time of war, for raiſing that number of mariners "which the Legiſlature from time to time "declare to be neceſſary" for defending our coaſt and protecting our trade, whether this method be legal or no? This I ſay is the queſtion. And therefore I could not ſatisfy myſelf without entering as far into the merits of it as I could.

And I have delivered my opinion upon it without any reſerve.

KING'S BENCH, HILARY TERM, 29 GEO. III.

LEMAN *againſt* GOULTY *and Another.*

This was a rule calling on the plaintiff and the Rev. G. Sandby, D. D. vicar-general of the epiſcopal court of Norwich, to ſhew cauſe why a writ of prohibition ſhould not iſſue to prohibit that Court from holding further plea of the matters between the parties.

The defendants, who were churchwardens of St. Andrew's, Norwich, were cited on the 26th of March, 1788, in the Biſhop's Court, to exhibit, on oath, a true account of all ſums of money which they had received, and paid, in the execution of their office, from Eaſter 1787 to that time. At a ſubſequent Court, held the 29th of April following, they gave in their accounts verified by oath. On the 18th of June objections were taken to two articles of the account; one of 6l. 11s. 6d. for lettering and gilding the pew doors; and the other 6l. 10s. charged as paid to the chief conſtable, and not relating to the office of church-warden; which were diſallowed. Then they were admoniſhed to pay 12l. 1s. as the balance of their accounts, and 13s. 4d as coſts; and for not appearing at a ſubſequent Court on the 23d of October 1788, and obeying the monition, the judge pronounced them contumacious, and excommunicated them. At a Court held on the firſt of Auguſt 1788, it was alleged, that the plaintiff was preſent at a veſtry meeting of the pariſhioners of St. Andrew's on the 12th of March 1788, when the Church-wardens' accounts were produced and allowed, and that the Plaintiff and the reſt of the pariſhioners had ſince paid the ſums rated on them; and that the ſum charged to have been paid to the conſtable was an annual

ſum,

ſum, which the Church-wardens for the time being appeared to have regularly paid. The ſuggeſtion ſtated, that it appeared to the judge of the Spiritual Court, by the account delivered in by the Defendants on the 29th of April, that it had been allowed and approved at the veſtry meeting.

LORD KENYON, Ch. J.—When the Churchwardens had delivered in their account, they had done every thing which the Spiritual Court had a power of enforcing. There was then an end of the juriſdiction of that Court; it was *functus officio*. The general grounds of a prohibition to the Eccleſiaſtical Courts are either a defect of juriſdiction, or a defect in the mode of trial. If any fact be pleaded in the Court below, and the parties are at iſſue, that Court has no juriſdiction to try it, becauſe it cannot proceed according to the rules of the common law; and in ſuch caſe a prohibition lies. Or where the Spiritual Court has no original juriſdiction, a prohibition may be granted after ſentence. But where it has juriſdiction, and gives a wrong judgment, it is the ſubject matter of appeal, and not of prohibition. This doctrine was laid down in the caſe of *Symes* v. *Symes*, 2 *Burr.* 813. Now in this caſe, with reſpect to the compelling of a production of the church-wardens' accounts, the Spiritual Court had excluſive juriſdiction: but there their authority ceaſed; and every thing which they did afterwards was an exceſs of juriſdiction, for which a prohibition ought to be granted.

ASHHURST, J.—It ſeems that the Spiritual Court have exceeded their juriſdiction, and therefore a prohibition ſhould be granted. They had a right to compel the churchwardens to deliver in their account, but when that was done, they could take no further cognizance of the matter.

BULLER, J.—This is a motion for a prohibition after ſentence; in which caſe we cannot go out of the proceedings, to ſee whether the Spiritual Court had any juriſdiction. But I think it does appear on the face of theſe proceedings, that the Court below had no authority to give the ſentence which they have given; and upon that ground a prohibition ought to be granted. If the Eccleſiaſtical Judge give a wrong ſentence on the merits, where he has juriſdiction, that is only the ſubject matter of appeal, and not of a prohibition. But where it appears on their own proceeding that they had no juriſdiction, there a prohibition is the proper remedy.

GROSE, J.—Of the ſame opinion.

Rule abſolute.

THE

LAWYER'S

AND

MAGISTRATE'S MAGAZINE.

For JUNE, 1790.

Adjudged Caſes in the Courts at Weſtminſter in Eaſter Term, 1790.

REX *v.* JOSEPH SCOTT, *Cl. and another.*

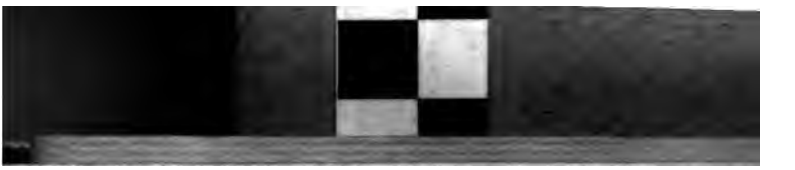
THE Seſſions of Salop, upon an appeal againſt a rate to the poor, charged upon two ſchool-houſes at Newport, confirmed the rate ſubject to the opinion of the Court.

CASE.

W. Adams having conveyed in fee a free-ſchool and two houſes in Newport for the reſidence of a maſter, and uſher, with a conſiderable eſtate at Knighton in the county of Stafford, for the ſupport of the ſame, and veſted the ſame in the Haberdaſhers Company in London as truſtees, a private Act of Parliament was paſſed in the 12th *Car.* II. entituled "An Act for the incorporation of the Maſter and Wardens of the Company of Haberdaſhers, London, to be Governors of the Free-School and Alms-Houſes in Newport in the County of Salop, of the foundation of W. Adams, and for ſettling Lands and Poſſeſſions on them for the Maintenance thereof, and other charitable Uſes;" which was confirmed and perpetuated by the 13 *Car.* II. By the Act of 12 *Car.* II, after reciting that W. Adams, had, out of

a ſincere intention for public good, at his own expence, erected the ſaid ſchool-houſes for the maſter and uſher, and four alms-houſes in Newport, and for other pious and charitable purpoſes, (among other things) it was enacted "That the manor and grange of Knighton, with the appurtenances, and all other lands and hereditaments, ſettled and conveyed by Adams to the Governors and their ſucceſſors for the purpoſes aforeſaid, be, and at all times hereafter ſhall be, *freed, diſcharged, and acquitted of and from the payment of all and every manner of taxes, aſſeſſments, or charges, civil or military, whatſoever*, hereafter to be laid and impoſed by authority of Parliament, or otherwiſe; and the ſaid manors, meſſuages, lands, tenements, and premiſes, and the owners and occupiers thereof, or any of them, ſhall not at any time hereafter be rated, taxed, or aſſeſſed, to pay any ſum or ſums of money, or be otherwiſe charged in any way whatſoever, for or in reſpect of the ſaid manors, lands, and hereditaments, or any of them, for or towards any manner of *public tax, aſſeſſment, or charge, whatſoever*; any ſtatute, law, or ordinance, to the contrary thereof in any wiſe notwithſtanding." The appellants, having proved this act, and that the two houſes had been previouſly conveyed by Adams to, and veſted in, the ſaid Governors for the purpoſes aforeſaid, and that the premiſes had not been rated or paid to the relief of the poor of the pariſh in the memory of any perſon living, inſiſted that they were exempted by the ſaid ſtatute, and were not liable to the payment of the poor's rate: but the Seſſion adjudged that they were not exempted, and confirmed the rate.

LORD KENYON, Ch. J.---Theſe lands having been given for eleemoſynary purpoſes, the Legiſlature ſeem to have intended to exempt them from all public taxes whatſoever. And it is immaterial to the pariſh whether theſe lands be exempted from the poor's rate or not; ſince if they be not exempt, greater contributions muſt be raiſed. If a conſtruction of this Act of Parliament, manifeſtly erroneous, had hitherto prevailed, we ſhould have been bound to correct it: though indeed, had the words of the ſtatute been very doubtful, the contemporary and ſubſequent uniform uſage would have great weight. But without reſorting to the uſage in this caſe, the words of this ſtatute are very clear and poſitive; for they ſpeak of all *publick taxes* whatſoever. The whole argument reſolves itſelf into this, whether in the idea of the Legiſlature at the time of paſſing this Act of Parliament, the *poor's tax* was a *publick tax*? The Acts of Parliament, which have been referred to in the argument, do



do not prove the point for which they were mentioned. But the other Acts of Parliament, reſpecting the poor, are deciſive of this queſtion. The ſtatute of 3 *Will.* and *Mary*, cap. 11, § 6, ſpeaking of the means by which a ſettlement may be gained, ſays, "that if any perſon ſhall be charged with and pay his ſhare towards the *publick taxes or levies* of the ſaid pariſh, he ſhall be adjudged to have a legal ſettlement in the ſame." Now on the conſtruction of this ſtatute, it never was doubted but that a payment towards the *poor's rate* was ſufficient to give the party a ſettlement. I am therefore clearly of opinion, that the exemption which has hitherto prevailed, ought to continue in future.

The three other Judges concurred.

Order of Seſſions, confirming the rate, quaſhed.

The KING v. *the Inhabitants of* HOLY TRINITY, *in the* MINORIES.

Two Juſtices removed Frances Whitfield, wife of Joſhua Whitfield, (a patient in Guy's Hoſpital), with her three children, from Bermondſey to Holy Trinity. The Seſſions confirmed the order.

C A S E.

Joſhua Whitfield, the pauper, by indenture, dated the 24th of June, 1762, was bound apprentice to John Grimes, of Tower-Hill, London, taylor, (being a place neither within the pariſh of the appellants or reſpondents), to ſerve for ſeven years. He ſerved his maſter about ſix years of the term; when his maſter declined buſineſs, and informed the pauper that he wiſhed him to get another maſter for his good. The pauper then went home to his father, who lived in St. Olave, Southwark, with whom he ſtaid three or four weeks; and if the pauper could have got a ſervice in that time, he would have taken it; but not meeting with any, he returned to Grimes, who thereupon told him that he heard Mr. Edwards (who was alſo a taylor, and lived in Holy Trinity) wanted a man; and told him to go to Edwards, and make an agreement with him for his (the pauper's) good; and that he underſtood Edwards would take him for twelve months. The pauper accordingly went to



Edwards, and entered into an agreement in writing, under ſeal, with him, covenanting to ſerve him for twelve calendar months, from the 11th of July, 1768, in his buſineſs of a taylor; and Edwards thereby agreed to inſtruct him in that buſineſs, and find him in victuals, drink, and lodging, and at the end of the term, to pay him 12l. in conſideration of his ſervice. The agreement was not ſtamped. The pauper was 19 years of age when he left Grimes; and the indentures were not aſſigned, or cancelled: but after the pauper had ſerved Edwards two months, Grimes gave him up his indentures; and he continued to ſerve and board with Edwards to the end of the term agreed, and then received his wages, and applied them to his own uſe. The queſtion was, whether he gained a ſettlement by his ſervice with Edwards in Holy Trinity?

LORD KENYON, Ch. J.—It is extremely clear that, while the indentures of apprenticeſhip continue in force, the apprentice is not *ſui juris*, and cannot gain a ſettlement as a ſervant. But it has been ſettled as long ago as the beginning of the late reign, in *Rex* v. *St. George, Hanover Square*, that the apprentice need not continue in the actual ſervice of the firſt maſter during the whole term, but that if he be aſſigned over by the firſt maſter, or continue with his privity and conſent in the ſervice of another perſon, he may gain a ſettlement by ſerving the ſecond maſter forty days. The caſes, which have been decided upon this ſubject, have been determined on nice diſtinctions: but ſtill thoſe diſtinctions ought to be adhered to, as they have ſettled the boundaries on this point. The one is the caſe of *The King againſt the inhabitants of Fremington*, where it was held that the apprentice gained a ſettlement by ſerving the ſecond maſter with the *conſent of the firſt*. The caſe on the other ſide is that of *Rex* v. *St. Luke's, Middleſex*, where a *general licence given by the maſter to the apprentice to ſerve whom he would*, without any conſent to ſerve any perſon *in particular*, was held inſufficient to enable the apprentice to gain a ſettlement by ſerving ſuch ſecond maſter. Now this caſe falls within the principle of the former of thoſe: for the apprentice went not only with the conſent, but with the expreſs recommendation of the firſt maſter, to ſerve the ſecond, and he went there to follow the ſame trade which his firſt maſter had exerciſed. It has been ſaid that this caſe muſt be governed by that of *Rex* v. *Sandford*; but there is a ſolid diſtinction between that caſe and the preſent. For there the maſter gave up the indentures previous to the pauper's entering into the ſecond ſervice: but here the indentures were not given up

till

till more than 40 days had elapſed after the apprentice had ſerved the ſecond maſter; and that is ſufficient to give him a ſettlement in that pariſh. Suppoſing this queſtion were to ariſe in another ſhape, and that the pauper were proſecuted for exerciſing his trade without having ſerved an apprenticeſhip according to the ſtatute, there is no doubt but that the ſervice with the ſecond maſter would be deemed a ſervice under the indentures previous to the time of their being delivered up.

BULLER, J.---The pauper could gain no ſettlement by living as an hired ſervant with Edwards, becauſe the indentures of apprenticeſhip ſtill exiſted: and the only queſtion is, whether the maſter did *expreſsly conſent* to that ſervice or not. For all the caſes ſhew that *mere knowledge* is not ſufficient; knowledge does not imply conſent. Now here was an expreſs conſent and recommendation of the firſt maſter to ſerve the ſecond, and then the caſe comes preciſely within that of *Rex* v. *Fremington*. If indeed the apprentice had not gone into Edwards's ſervice, he would not have gained a ſettlement by ſerving any other perſon, becauſe a general licence to ſerve whom the apprentice chooſes, is not ſufficient. By going into the ſervice of any other perſon, the apprentice would have gone without the expreſs conſent of the firſt maſter, and therefore might have been recalled by ſuch maſter; but he could not have been recalled by the firſt maſter from the ſervice of Edwards, becauſe of the expreſs conſent to ſerve Edwards. This is diſtinguiſhable from the caſe of *Rex* v. *the Inhabitants of Sandford*; for there the maſter had given up the indentures, and he had no longer any power over the ſervant: but here the indentures were in force during the firſt two months of the pauper's ſervice with Edwards.

GROSE, J.---It is neceſſary to adhere to the adjudged caſes; and I think that this caſe muſt be governed by that of *Rex* v. *Fremington*. And that caſe alſo ſhews that the ſervice with the ſecond maſter need not be *for the benefit of the firſt*. With reſpect to the caſe of *Rex* v. *Sandford*; the proper anſwer has been already given, and the diſtinction between that caſe and the preſent is ſufficiently clear. In this caſe the indentures were not given up till after forty days ſervice with the ſecond maſter, which was ſufficient to give the apprentice a ſettlement by ſerving Edwards with the conſent of the firſt maſter; and the circumſtance of the indentures not being given up till that time rather ſhews, that the firſt maſter intended that the ſervice ſhould continue during that time under the Indentures. Both orders confirmed.

REX

REX *v. the Inhabitants of* SAMBORN.

Two Juſtices removed W. Wheyam, from Samborn to Tamworth. Seſſions, on appeal, quaſhed the order.

CASE.

In 1706, a certificate was given by the pariſh of Tamworth to the hamlet of Samborn, acknowledging H. Wheyam, the grandfather of the pauper, to be an inhabitant legally ſettled in their pariſh. T. Wheyam, the father of the pauper, was born at Samborn, under this certificate from Tamworth. W. Wheyam, the preſent pauper, never gained any ſettlement for himſelf; but his ſettlement depends on the ſettlement of his father, T. Wheyam. In 1736, a certificate of the pauper's father, T. Wheyam, was given to the pariſh of Tardebigge; in which T. Allcock and R Boulton, of Samborn, *churchwarden and overſeer of the poor of the pariſh of Great Coughton*, Warwick, acknowledged T. Wheyam, and E. his wife, to be *inhabitants legally ſettled at Samborn, in their ſaid pariſh of Great Coughton*; and promiſed to receive them *into the ſaid pariſh* whenever they ſhould become chargeable; and to provide for them as their inhabitants legally *ſettled within the pariſh of Great Coughton*. This certificate was properly atteſted and allowed by two Juſtices of Warwickſhire. The hamlet of Samborn does now, and did at the time of the date of the certificate of 1736, maintain its own poor ſeparately from the pariſh of Great Coughton; and has, and at that time had, a churchwarden and an overſeer of their own, ſeparate from the pariſh of Great Coughton. T. Allcock and R. Boulton, who ſigned the certificate of 1736, were churchwardens and overſeers of the poor of the *hamlet* of *Samborn*, at the time of granting the certificate.

It was now argued againſt the order of Seſſions, 1ſt, That the certificate given with the pauper's father was not binding on the hamlet of Samborn, the overſeers having ſtyled themſelves to be the officers of the *pariſh at large*; whereas the Certificate Act, 8 and 9 *Will.* III. cap. 30, requires the certificate to be ſigned by the officers of the pariſh, *townſhip*, or *place*, and Samborn was, in fact, ſo far as reſpects the maintenance of the poor, totally independent of the pariſh at large,

large. 2dly, The Seſſions ought not to have admitted evidence to contradict the certificate, which ſtated the perſons granting it to be overſeers of the pariſh at large.

LORD KENYON. I cannot form any doubt in my own mind in this caſe. The Certificate Act requires that the certificate ſhall be ſigned by the churchwardens and overſeers of the pariſh, townſhip, or place, granting the certificate; and it is expreſsly ſtated in the concluding part of this caſe that the certificate in queſtion was ſo ſigned.

BULLER, J.—The evidence does not *contradict*, but it *explains*, the certificate.

Order of Seſſions confirmed.

BENWELL v. BLACK.

The defendant brought a writ of error upon a judgement againſt him; and the plaintiff brought another action on the judgement, and recovered, and ſued out execution.

The queſtion was, Whether he could ſue out execution on the ſecond judgement, before the writ of error was determined?

LORD KENYON, Ch. J.—There are two ways by which a plaintiff may reap the benefit of his judgement; either by a writ of execution, or by another action. The former is the more regular, as well as the leaſt expenſive, mode: but it is admitted that in this caſe the plaintiff is not entitled to that: then we ought not to determine that that which is the moſt oppreſſive mode of obtaining the effect of the judgment, ſhould be the moſt favoured; and it would be permitting the plaintiff to do that indirectly which cannot be done directly. We are therefore of opinion, that the plaintiff is not entitled to ſue out execution on the ſecond judgment, as he could not have taken out execution on the firſt.

But as this point had never been ſettled before, the Court made the

Rule abſolute, to ſet aſide the execution.

GWIN-

GWINNET *v.* PHILLIPS, *and others.*

This was an action of debt on the 11th *Geo.* II. cap. 19. § 3. to recover double the value of the goods, which were removed by the defendants to avoid a diſtreſs for rent. The declaration ſtated that 57l. was in arrear for rent. It was proved at the trial, that the notice of diſtreſs alleged that 55l. was due; but the plaintiff was ready to ſhew, by the tenant's own admiſſion, that 57l. was due: it was objected that the plaintiff was bound by the notice of diſtreſs, and the plaintiff was nonſuited.

This was a rule to ſhew cauſe why the non-ſuit ſhould not be ſet aſide, on the ground that the ſum mentioned in the notice was immaterial.

LORD KENYON, Ch. J.—There is no doubt but that if the plaintiff proteſs to ſet out his title, he muſt ſet it out correctly. So where a contract is to be ſtated in a declaration, unleſs it be truly ſtated, the plaintiff cannot recover. But it is now ſaid, that *in every caſe* the facts alleged by a plaintiff muſt be ſtrictly proved, otherwiſe he muſt be nonſuited. And therefore in an action of covenant for rent for 100l. if the plaintiff proved only 56l. he muſt fail. But the rule can never be carried to ſuch an extent. I have heard both in and out of Courts that the doctrine in *Briſtow* v. *Wright*, muſt be confined to *contracts*. Good ſenſe will reconcile all the authorities. If the plaintiff allege any thing which forms a conſtituent part of his title, he muſt ſet it out correctly, as was held in *Savage, qui tam*, v. *Smith*. There the ground of the execution was the judgement; and though the plaintiff were not bound to have ſtated the judgment, yet being ſet out, it ought to have been proved. But here it was impertient to ſtate what the rent was; the defendants incurred a penalty under this Act of Parliament, in fraudulently removing the goods which were ſubject to the diſtreſs. Whether 5l. or any other ſum, were in arrear, was perfectly immaterial; the damages were not to be meaſured by the quantity of rent, but by the value of the goods removed. And the notice of diſtreſs might have been abandoned; for a party may diſtrain for rent, and avow for fealty.

ASHHURST, J.—If, in a caſe in which a ſum of money is a conſtituent part of the plaintiff's demand, it be competent to

to him to prove a ſmaller ſum than that alleged in the declaration, (and ſuch rule holds where the rent itſelf is the very ground of the action) *à fortiori*, was it competent to this plaintiff to ſtate any ſum as due for rent, ſince the rent was merely matter of inducement? The giſt of this action is the fraudulent removal of the goods from the premiſes in order to defeat the diſtreſs: it was therefore immaterial to the defendants whether one ſum or another were due for rent; for in either caſe they are guilty of a tort.

BULLER, J.—If in ſetting out the demiſe in this caſe, the plaintiff had ſtated a ſum as reſerved for rent different from that mentioned in the leaſe, this caſe would be governed by that of *Briſtow* v. *Wright*. But this Court has repeatedly ſaid that that caſe was not an authority beyond the caſes of contracts; for a contract is entire in its nature, and muſt be proved as laid. Perhaps the rule laid down in *Briſtow* v. *Wright*, will be found to extend to *all caſes of records, and written contracts*; becauſe when the plaintiff is under the neceſſity of ſtating a judgment or a record, he muſt ſtate it truly; for if he do not, the anſwer to the action is, that that which is proved is not the ſame as that which is declared on. But in this caſe the variance does not conſiſt in any part of the contract, but in an averment of matter ſubſequent to the contract. The averment was merely a matter of inducement to the action; and ſuch averments need not be preciſely proved.

Rule abſolute.

JARMAN *v.* WOLLORTON, *Aſſignee of* DOVEY, *a Bankrupt.*

The bankrupt's wife, previous to her marriage, aſſigned to the plaintiff, as truſtee under her marriage-ſettlement, her ſtock in trade, &c. for her ſeparate uſe and diſpoſal, to the intent ſhe might carry on her ſeparate trade, together with her other effects, at the apartments then in her occupation. After the marriage, the goods and effects were removed to the huſband's houſe, where the wife ſtill carried on her trade in a ſeparate apartment there. There was no ſchedule of the effects annexed to the deed of ſettlement, but the truſtee kept an inventory of the furniture, and ſome of the effects in queſtion.

Upon the huſband's bankruptcy, an action of trover was brought by the truſtee againſt the aſſignees to recover the

ſtock

ſtock in trade and furniture, ſo ſettled to the wife's ſeparate uſe.

Some doubts aroſe upon the evidence, whether the wife carried on the buſineſs ſtrictly for her own ſeparate uſe; but the Jury found that it was *not carried on ſeparately*, and brought in their verdict for the defendant as to the ſtock in trade, and for the plaintiff for the furniture.

The defendant now moved for a new trial, on the ground that the truſt-deed could not protect the furniture, eſpecially as it was not particularly deſcribed and ſcheduled in the deed; and alſo becauſe the aſſignees were entitled to keep the poſſeſſion by the ſtatute 21 *Ja.* I. cap. 19.

LORD KENYON, Ch. J.—How far it would have been wiſe to have determined originally that the actual poſſeſſion ſhould be conſidered as deciſive evidence of all property, is a queſtion now too late to be diſcuſſed. Becauſe as far back as the year-books 37 *Hen.* VI. 30, a gradual was limited to *A.* for life, and afterwards to *B.* In modern times the courts, proceeding upon the ſame principle, have ſaid that perſonal property may be carved out in the ſame manner, and poſſeſſion given to one for life, and then over. Now in this caſe, before the bankrupt's marriage, a formal ſettlement was made of all the wife's property, with the conſent of both parties. It is true indeed that there was no enumeration of the articles of which her property conſiſted; and though that circumſtance was mentioned, with many others, by Lord Mansfield in *Cadogan* v. *Kennet*, it does not follow that he would have been of a different opinion if that circumſtance had not exiſted in that caſe. And I do not ſee what difference it could make; for a ſchedule conveys no information to the reſt of the world, if it were annexed to the ſettlement, its exiſtence would only be known to the parties intereſted in it; and therefore ſuch a tranſaction as this would be equally open to fraud, if there had been a ſchedule of this furniture as it is now. But the Jury have, by their verdict, negatived fraud; and to be ſure there was no ground even to impute it to the tranſaction. And at the trial, the furniture claimed as the wife's property was fairly identified. Neither do I think that this caſe is affected by the 21 *Jac.* I. the words of that ſtatute furniſh an anſwer to the defendant's argument; for they are, "that if any perſon ſhall become bankrupt, and at ſuch time ſhall, by the conſent of the true owner, have in his *poſſeſſion, order, and diſpoſition*, any goods whereof he ſhall be the reputed owner, and take upon him the *ſale, alteration, or diſpoſition, as owner*, the commiſſioner, may ſell."

But

BULLER, J.—As it ſtrikes me at preſent, I think the verdict bears rather hard upon the wife reſpecting the ſtock in trade. For the weight of evidence is, I think, againſt the defendants upon that point, and there is no pretence to ſay that there was fraud in any part of the caſe. This motion has been made on two grounds; firſt, that there was no inventory, or any ſpecific account, of the furniture annexed to the deed, ſo as to identify the wife's property; and, ſecondly, that the defendants are entitled to theſe goods under the 21 *Jac.* I. cap. 19. With reſpect to the latter point, it is ſufficient to ſay that the huſband had not the *order and diſpoſition* of this property *with the conſent of the real owner*. The truſtee was the legal owner; and he gave no conſent for ſuch purpoſe: and the wife's poſſeſſion, in the manner proved at the trial, is no evidence of fraud; for ſhe was the agent for the truſtee. The objection ariſing from the want of a ſchedule annexed has no weight; if a ſchedule were neceſſary, here was an inventory which will ſufficiently anſwer the purpoſe. But I think it is unneceſſary, conſidering the nature of the property; it was not always to remain in the ſame ſtate; the very object of the ſettlement was, that the wife ſhould ſell the goods and purchaſe others, in order to make a profit of them. In the caſe of *Haſelinton* v. *Gill*, 24 *Geo.* III. ſome of the goods taken in execution were not thoſe mentioned in the ſettlement, but ſtock bought by the wife with the profits of the ſale of the milk. That caſe is an authority for the preſent throughout.

Rule diſcharged.

CASTLE *v.* BURDETT, *and others.*

This was an action of treſpaſs tried at the Kent Aſſizes before *Gould*, J. in which the defendants, being exciſe officers, had ſeized a quantity of tobacco under the 23 *Geo.* III. cap. 70. The Act ſays, no writ ſhall be ſued out againſt any perſon acting in execution of that ſtatute, until *one calendar month next after notice* in writing, ſhall have been delivered to him. In this caſe the notice was ſerved April 28th, and the writ ſued out on the 28th of May, and the learned Judge being of opinion that the writ was ſued out a day too ſoon, the plaintiff was non-ſuited.

Now upon an application to ſet aſide the non-ſuit, and for a new trial,

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THE COURT said, That where a computation is to be made *from* an Act done, the day when ſuch act was done is to be included, according to the rule laid down in the *King* v. *Adderly*, *Doug.* 446, and the caſes there cited.

Rule abſolute.

REX v. JAMES BEESTON.

The pariſhioners of *Drayton in Hales*, Salop, at a ſpecial public meeting, conſented that the church-wardens and overſeers, or the major part of them, ſhould contract with William Atherton for maintaining and employing the poor of that pariſh. In conſequence of which the three church-wardens, and two of the overſeers, did contract with Atherton for that purpoſe; but the defendant, who was one of the overſeers, refuſed to join, though he had the requiſite ſum of the pariſh money in his hands at the time.

This was a rule to ſhew cauſe why a mandamus ſhould not iſſue againſt the ſaid overſeer, commanding him to pay the ſum required. The queſtion was, whether it was neceſſary that all the church-wardens and overſeers ſhould concur in making this contract, or whether the majority of them did not bind the reſt, the 9 *Geo.* I. cap. 7, § 4, on which this contract was made, enabling *the church-wardens and overſeers of the poor of any pariſh, with the conſent of the major part of the pariſhioners*, or inhabitants in veſtry aſſembled, to contract.

LORD KENYON, Ch. J.—The conſtruction contended for, namely, that the concurrence of all the overſeers is neceſſary, muſt have prevailed, if the Legiſlature had in expreſs terms required it: but as it would be attended with manifeſt inconvenience, the argument *ab inconvenienti* ought to have great weight in this caſe where the Legiſlature have not ſo required it. A contract has been entered into, in which the pariſh at large is concerned, and which the Act of Parliament has enabled the pariſh officers, with the concurrence of the pariſh, to enter into; and the queſtion is, whether one obſtinate man, in oppoſition to all the reſt of the pariſh, in an act in which they are more intereſted than he is, ſhall be able to defeat their purpoſe. I do not mean to ſay that the church wardens and overſeers are technically a corporation; but as far as concerns the regulation of the poor of the pariſh, they ſtand in *pari ratione*. And in the

iſſ

inſtance of corporations, the act of the majority binds the whole; ſo much ſo, that the Court will compel the perſon who has the cuſtody of the corporate ſeal, to affix it to any act according to the vote of the majority, though againſt the conſent of ſuch perſon; as was done in the caſe of *Wadham College*, *Cowp.* 377. However, I do not go on the ground of this ſimilitude; but the foundation of my opinion is this: the ſtat. 43 *Eliz.* cap. 2, has directed that the general acts to be done by the church-wardens and overſeers reſpecting the poor, ſhall be done by the majority of them; and I think that the ſpirit of that ſtatute pervades all the ſubſequent acts reſpecting the government of the poor. The ſtatute in queſtion I conſider as engrafted on the 43 *Eliz.* qualifying the particular act, but referring, for the execution of it, to the manner pointed out by that ſtatute. Beſides, in common underſtanding, what is required to be done by the church-wardens and overſeers, is ſatisfied by being done by a *majority*. And indeed if we were to determine otherwiſe, the inconvenience would be ſo great as to make it neceſſary for the Legiſlature to interfere, and paſs another law. This is very different from the caſe of truſtees in ſettlements, who are generally choſen by the different branches of the family, in which caſe it is neceſſary that they ſhould all concur in every act, in order that each may protect the intereſt which he was appointed to guard. With reſpect to the caſe cited from 3 *Mod.* 371, that perhaps was determined on the ground that the church-wardens were to be conſidered as an integral part: though indeed if that were *res integra*, I ſhould be inclined to make a contrary determination, becauſe the 43 *Eliz.* enacts that the church-wardens, with certain other perſons, ſhall be called overſeers of the poor. On the whole then, as our opinion does not contradict the words of the 9 *Geo.* I. but is conformable to the meaning of it, this rule muſt be made abſolute.

BULLER, J. concurred, and ſaid, the general uſage under another clauſe of this Act, ever ſince it paſſed, ſhews what the general underſtanding has been of the intention of the Legiſlature upon this point. The 8th ſection, ſpeaking of the time of notice to be given of appeals from orders of removal, ſays that no appeal ſhall be proceeded on, unleſs reaſonable notice be given by the church-wardens and overſeers of the pariſh appealing unto the church-wardens and overſeers of the other pariſh. But it never was imagined that a notice given only by three church-wardens and overſeers was inſufficient; the contrary opinion has always been held.

held. The uſage therefore ſhews what is meant by the general term "church-wardens and overſeers."

Rule abſolute.

STURDY *and Another, Aſſignees of* BLAKISTON, *a Bankrupt, againſt* ARNAUD.

September 27, 1788, the defendant gave the bankrupt a bond before his bankruptcy, conditioned to pay him 100l. a year by quarterly payments, upon which this action was brought. The defendant pleaded that at the time of commencing this action, only four quarterly payments were due; that on the 29th of September, 1788, and before this action was brought, and alſo before the bankruptcy, the defendant had lent 200l. bearing intereſt, to the bankrupt and another, on their promiſſory note, payable on demand; that the bankrupt, before his bankruptcy, agreed, and *by a writing under his hand*, of the ſame date, *authoriſed and empowered the defendant to retain out of the annuity*, as the ſame ſhould become due, the 200l. and intereſt; which 200l. and the intereſt, ſtill remain due in arrear and unpaid, otherwiſe than by retaining the ſame out of the annuity ſo due; and that the arrears of that annuity are ſtill inſufficient to ſatisfy the ſame. The plaintiffs replied the bankruptcy of Blakiſton after the above authority given, and the aſſignment of his effects to the plaintiffs before either of the quarterly payments of the annuity became due. To this there was a demurrer and joinder.

LORD KENYON, Ch. J—The doctrine of lien and of ſet-off, bears no relation to the queſtion now before us: and indeed I ſhould be ſorry for the plaintiffs themſelves, if the law were with them, ſince their conduct is ſo unconſcientious that if the defendant were to apply to a court of equity for relief, that court would not only give ſuch relief, but would alſo decree the plaintiffs to pay the coſts both in law and equity; on the ſame principle on which Sir Thomas Moore, when Lord Chancellor, proceeded, when he firſt gave relief againſt the penalty of the bond, the obligee in that caſe having paid the ſum mentioned in the condition after, though not on, the day. This is an action brought on a bond, which was made for ſecuring the payment of an annuity at certain times in the year; and be-

before the time of the firſt inſtalment, the obligor lent to the obligee 200l. in order to ſecure the re-payment of which, he entered into this agreement, ſtated in the plea, by which he was authoriſed to retain the payments of the annuity from time to time, till the 200l. and intereſt, ſhould be paid. But in anſwer to this it is ſaid, that theſe payments did not become due till after the bankruptcy of the obligee, and that therefore they cannot be retained againſt his aſſignees. Now in juſtice and conſcience it is impoſſible to raiſe any doubt; neither is there any doubt in point of law; for the condition of the bond has not been broken, and conſequently no action can be maintained upon it. It cannot be ſaid that the condition has been broken, when it appears that payment has been made according to the terms of it. For though this is not a formal plea of *ſolvit ad diem*, yet it is equivalent to it. But it is ſaid that this cannot be ſo conſidered, becauſe the aſſignees had a right to thoſe payments which became due after the bankruptcy: but they have only that property to which the bankrupt is entitled, and they muſt take it ſubject to his equity; and here thoſe payments were anticipared.

ASHHURST, J.—The defence ſtated in the plea does not contradict the annuity bond; on the contrary, it is perfectly conſiſtent witn it, and proceeds on the ſuppoſition of there being ſuch a bond. The plea affirms the bond, and ſpecifies the mode by which the money lent to the obligee was to be repaid, namely, by retaining the payments ſecured by the annuity bond. And it was competent to the bankrupt to enter into ſuch an agreement before his bankruptcy.

BULLER, J.—This caſe does not want the aſſiſtance of an Act of Parliament, or of a court of equity. There is indeed an old caſe which ſaid that payment *before* the day would not diſcharge the bond. But, in the firſt place, that caſe has been frequently over-ruled; and, if it were ſtill law, it would not govern this caſe; becauſe it has been held that the obligor may plead it as payment *at* the day, and this would be evidence of ſuch payment.

Judgment for the defendant.

MILNER

MILNER *and Others, againſt* MILNES *and Others.*

This was an action of treſpaſs for ſeizing a boat belonging to the plaintiffs, and converting it to the uſe of the defendants; to which there was a plea *in bar* that Mary Murgatroyd, one of the plaintiffs, at the time of exhibiting the plaintiff's bill, was covert with R. Medd, her huſband, now living. To this plea there was a general demurrer.

In ſupport of the plea, it was contended that though the defendants might have pleaded the coverture in *abatement*, it might alſo be pleaded *in bar*, and *Audley's* caſe, *Moore* 25. *Thomſon* and *Kitchin*, 11 *Mod.* 177. 3 *Bulſtr.* 164. *Powes* v. *Marſhal. Sid.* 172. *Blackbourn* v. *Greaves*, 2 *Lev.* 107. 2 *Raym.* 1237, were cited.

LORD KENYON, Ch. J.—We have looked into the caſes which were cited in the argument; and though there is no preciſe precedent in point, we are of opinion, on a review of all the authorities, that this plea in bar cannot be ſupported. It is extremely clear on the one hand, that the marriage gives to the huſband all the perſonal eſtate which the wife has in poſſeſſion: it is alſo clear on the other hand, that where *a choſe in action* of the wife is to be reduced into poſſeſſion, and it is neceſſary to bring an action for that purpoſe, it muſt be brought in the names of both the huſband and wife. And it was abſolutely neceſſary that the wife ſhould be a party to the preſent action. The defendant, by his plea, imputes to one of the plaintiffs a perſonal defect: now in general we find that perſonal diſabilities muſt be pleaded in abatement. It is laid down as a general poſition in *Com. Dig. Tit. Pleader*, 2 *A.* 1, that coverture in a woman, when either plaintiff or defendant, muſt be pleaded in abatement: and though no authority is referred to in ſupport of it, yet the opinion alone of ſo able a lawyer is of great authority. It is true that there is a precedent in the old entries, where the coverture of the plaintiff is pleaded *in bar:* but that is reprobated in 2 *Lutw.* 1641, where it is ſaid that all the other precedents are of pleas *in abatement*. My brother *Bulker* has alſo met with a caſe in the Year-books 39 *E.* 3. 32 *b*, which ſhews that this matter ſhould have been pleaded in abatement. As to the caſe cited from 1 *Sid.* 172, it is true that two of the Judges gave the opinion which was ſtated by the defendant's counſel: but the other two Judges, namely *Twiſden* and *Wyndham*, names

of great authority, were of a different opinion, and held that the husband and wife ought to have joined in that action. We are therefore of opinion on the authority of the case in the Year Books, as well as on that of Lord Ch. B. *Comyns*, and on the reason of the thing, that the coverture should have been pleaded in abatement. There is indeed the inconvenience, which was stated at the bar, that the husband may bring error if he please: but that does not conclude this question. With respect to the inconvenience of the shortness of time which the defendant has to plead in abatement; where such a plea is not merely dilatory, but goes to the merits of the cause, the Court will allow him a longer time than the four days to offer such a plea, lest the justice of the cause should be precluded, in the same manner that they will permit a tender after a special imparlance.

Judgment for the plaintiffs.

RADFORD, *qui tam*, *against* M'INTOSH.

This was an action on the statute 27 *Geo.* III. cap. 26. The first count in the declaration stated, that after the first of August, 1785, mentioned in a certain Act, &c. made in the 25th year of the present reign, entituled "An Act," &c. (25 *Geo.* III. cap. 51), and also after the 1st of August, 1787, and within six calendar months before the commencement of this suit, to wit, on the 18th of November, 1789, at Driffield in the county of York, the defendant, then and there being a person letting horses to hire for the purpose of travelling post by the mile, and from stage to stage, and *being duly licensed* according to the form of the statute in such case made and provided, to wit, at, &c. did let divers, to wit, two horses to hire by the mile or stage, to be used in travelling post in Great Britain, that is to say, from Driffield to Bridlington Quay, in the county aforesaid, the same being a great distance, and then ascertained, to wit, 15 miles; and did, upon such letting to hire, then and there receive to and for the use of the plaintiff, who sues as aforesaid (*the said plaintiff being then and there the farmer or renter of rates and duties in that respect granted by the first-mentioned Act of Parliament*), according to the form of the statute in such case made and provided, of and from the person hiring the said horses a large sum of money, to wit, 1 *d.* ½ per mile, for each of the said horses, for each mile the said horses were

hired to go, to wit, 15 miles, amounting in the whole to a large ſum of money, to wit, the ſum of 3*l.* 9*d.* yet the defendant, not regarding the ſtatutes, &c. after he had received the ſaid ſum of money as and for the rates and duties as aforeſaid, to wit, on &c. at &c. was guilty of *making falſe accounts* in reſpect to the ſaid rates and duties, that is to ſay, *in that he did not*, at any time in the weekly account kept by him for that week, wherein he ſo received the ſaid money as laſt aforeſaid, under and by virtue of the ſtatute in ſuch caſe made and provided, *account for the ſaid ſum of money ſo received by him as laſt aforeſaid*, but wholly neglected and omitted ſo to do, and after the receipt of the ſame, to wit, on &c. at &c. attended, delivered in, and paſſed, his ſaid account, wherein the ſaid ſum of money ought to have been inſerted as aforeſaid, in purſuance of the ſaid ſtatutes in that caſe made and provided, the ſaid ſum of money not being accounted for therein; and the defendant did not at any time account for the ſame; *with intent to defraud the plaintiff*, who ſues as aforeſaid, of the ſaid rate or duty impoſed by the ſaid firſt-mentioned act, and by him the defendant received as laſt aforeſaid, contrary to the form of the ſtatute, &c.

The fifth count was nearly ſimilar to the firſt; except that it ſtated that the defendant had let divers, to wit, *eight* horſes, &c.

BULLER, J. before whom the cauſe was tried at the York Aſſizes, ſtated to the Court, that a licence to let poſt-horſes was produced in evidence, granted by the plaintiff to the defendant; but it did not appear on the inſtrument whether this licence was granted by the plaintiff in the character of *collector* of the duties, or of *farmer-general*. But at the bottom of it was a memorandum, ſignifying that application muſt be made to the *farmer-general* of the duties to renew this licence annually; and on this piece of paper ſeveral entries were made by the defendant. It was alſo proved that the defendant had, on ſeveral occaſions, accounted with the plaintiff for the duties collected under this act, but had omitted in this inſtance the ſums ſtated in the firſt and fifth counts, though inſtead of having let *eight* horſes, as alleged in the fifth count, he had only let *five*. No grant of the duties to the plaintiff was produced either from the Lords of the Treaſury, or from the Commiſſioners of the Stamp-Duties, who had only a *general* commiſſion under the Great Seal, granted to them before the paſſing of this Act of Parliament. It was firſt objected on the part of the defendant

that



that the plaintiff who ſued as farmer-general, had not proved himſelf to be ſo, becauſe a legal appointment could only be made either by the Lords of the Treaſury, or by the Commiſſioners of the Stamp-Duties duly and ſpecially empowered by them; and, 2dly, that the evidence on the fifth count did not correſpond with the declaration; for it was ſtated that the defendant had let to hire *eight* horſes, whereas the plaintiff only proved a letting of *five*; and this being a contract of hire, it ought to have been ſet out correctly. A verdict was taken for the plaintiff for two penalties, on the firſt and fifth counts; with liberty to the defendant to move to enter a nonſuit, if the firſt objection were well founded; or to enter a verdict for the defendant on the fifth count, if he were right on the ſecond objection.

LORD KENYON, Ch. J.—In penal actions on the 2 & 3 *Ed.* VI cap. 13, § 2, which enables the owners of tithes to recover double the value, in caſe they are withdrawn, it has always been held ſufficient proof againſt the defendant that the party ſuing is in the act of receiving the tithes from him. So in this caſe, the defendant had admitted that the plaintiff ſtood in the relation of farmer-general to the duties, by accounting with him as ſuch.

BULLER, J.—It appears that the defendant has treated with the plaintiff in the character of a farmer-general. Then this comes within the claſs of caſes mentioned by my Lord, and other inſtances of actions for non-reſidence, where it is ſufficient to prove the defendant in poſſeſſion of the church, without proving preſentation, inſtitution, and induction: as was held in *Bevan, qui tam,* v. *Williams, E.* 16 *Geo.* III.

And the Rule was diſcharged.

A motion was then made to arreſt the judgment; becauſe no offence within the Act of Parliament was ſtated in the declaration, becauſe the defendant is charged with having made falſe accounts, *in not inſerting in the account the ſum of money received by him*; whereas the Act of Parliament only requires that the account ſhall contain the number of horſes, and of miles, and the names of the drivers.

BY THE COURT. Judgment muſt be arreſted on this objection. The ſtatute 25 *Geo.* III. only requires the poſtmaſters, in making up their accounts, to inſert therein the number of horſes let, and the number of miles, but does not require the amount of the duties received, to be ſpecified. There is indeed a ſchedule mentioned in the twelfth ſection, but no penalty is given by that clauſe; and the ſubſequent ſection, which creates the penalty, does not require that the ſums received ſhould be inſerted in the account, but only the

the materials which furniſh the amount of the ſums. It may be true, therefore, that the defendant has neglected to do that, which is imputed to him, and yet have complied with all the requiſites of the Act. Whether or not it would have been ſufficient to ſtate generally that the defendant had been guilty of delivering in a falſe account, without ſpecifying in what particular inſtance it was ſo, we give no opinion, though perhaps ſuch a general allegation might not be ſufficient even after verdict: but the plaintiff in this caſe, after having alleged generally that the defendant had been guilty of making falſe accounts, proceeded to ſtate in what the falſity of the account conſiſted; and, as that particular charge did not conſtitute any offence within the Act of Parliament, the plaintiff could not avail himſelf of the general allegation, even if it were ſufficiently deſcriptive of an offence.

Rule abſolute.

N. B. In a ſimilar Caſe, where it was objected that it was not proved that the defendant was licenſed, becauſe the licence itſelf was not produced, and the plaintiff was non-ſuited, on a motion to ſet aſide that non-ſuit,

BULLER, J. ſaid, that he was convinced that there was no weight in the objection; that it was not neceſſary to prove a licence having been granted in fact, for that other evidence would be ſufficient againſt the defendant, as that he had written up over his door "licenſed to let poſt-horſes."

REX v. *the Marquiſs of* STAFFORD, *and* T. GIFFARD, *Eſq.*

This was an application for a mandamus requiring the Lords of the Manor of Stowe Heath, in Staffordſhire, to preſent to the Ordinary the nomination of W. Morton, Clerk, to be ſtipendiary Prieſt and Curate of the Chapel of Willenhall, in the ſaid Manor, in order that he might obtain a licence from the ordinary

The affidavit ſtated the uſage to be, that the miniſter ought to be nominated and appointed by the inhabitants of Willenhall, having lands of inheritance within the town, and preſented and allowed by the Lord of the Manor of Stowe Heath. That it appeared from an ancient roll of the manor, dated in the 6th year of *James* I. that certain proceedings had been held before the commiſſioners of charitable uſes; and that it had been conſented and agreed that cer-



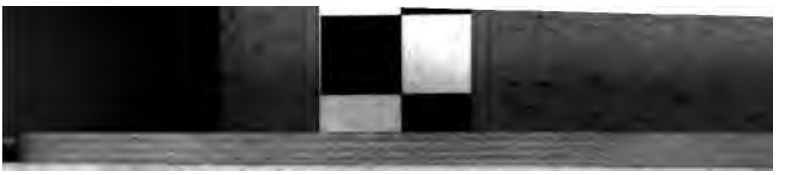
certain copyhold lands therein mentioned ſhould be let towards the reparation of the chapel and the maintenance of a ſtipendiary prieſt, for the ſaying of divine ſervice, miniſtering the ſacraments, &c. who ſhould be from time to time choſen and appointed by the inhabitants of Willenhall having lands there, and preſented and allowed by the Lord of the Manor of Stowe Heath; and that the perſon ſo appointed ſhould conform to the Eccleſiaſtical government, and reſide on the curacy; and on complaint to the Lord of the Manor by the inhabitants, of his non-reſidence, inſufficiency, negligence, or any other miſdemeanor, the Lord of the Manor ſhould give him half a year's notice to reform, and, if he did not reform, ſhould preſent and allow another curate, &c. to be nominated and appointed by the inhabitants, &c. as aforeſaid. That on the death of the late incumbent, in December, 1781, William Moreton and A. Haden were the candidates; and in order to determine the election, a poll was ſuggeſted by the defendants; that Moreton had 67 votes, and Haden 29, on which the former was nominated and appointed by a majority, by a proper inſtrument; but that the defendants refuſed to allow his nomination, and preſent him to the Ordinary. The affidavits in anſwer ſtated, that this was originally a free and private chapel, built by, and belonging to, the Lords of the Manor of Stowe Heath: and is purely a donative, without the admiſſion, inſtitution, or induction, of or by the Ordinary, or any other Eccleſiaſtical authority; and has not been augmented by Queen Anne's bounty. That the immediate predeceſſor of the laſt incumbent, who was appointed in 1720, was conſtituted and allowed to be miniſter by the defendants' anceſtors by a deed, by which, after reciting that "the major part of the inhabitants of Willenhall, having lands there, had *(as much as they might or could)* elected and nominated E. Holbrooke, and had deſired them (the deſendants' anceſtors) to allow him, &c." they preſented, and Holbrooke entered upon and performed the office, without any other inſtrument. [A ſimilar appointment of the late incumbent in 1744 was alſo ſtated. And with reſpect to the late election, it was ſtated that 45 of Moreton's electors were not reſident in the town of Willenhall, but in adjoining diſtricts within the hamlet of Willenhall; and that only four who voted for Haden were liable to that objection]. That the defendants had approved of Haden's nomination, and allowed and preſented him. And that Moreton was a man of indecent and immoral life; that *within the* laſt three years he had been repeatedly and notoriouſly

toriouſly guilty of drunkenneſs, ſwearing, gaming, lewd converſation, and other immoralities; and that he had not only neglected his duty as a miniſter, but had been actually in a ſtate of ebriety whilſt in the performance of divine ſervice.

Erſkine and *Leycester*, ſhewed cauſe againſt this rule in laſt Michaelmas Term; inſiſting, 1ſt, That the defendants did not act merely miniſterially in allowing the nomination by the freeholders, but that they had a right to approve or reject the perſon ſo nominated; 2dly, That this benefice was purely a donative; and though the defendants, who were the patrons, could not arbitrarily reject the perſon nominated by the reſiant freeholders, yet that they might reject him for any cauſe, which would be a ſufficient ground to warrant a biſhop in rejecting a perſon preſented to him in the caſe of a preſentative benefice. And that it ſufficiently appeared by the affidavits in anſwer to this application, that Moreton was of ſuch an immoral character as would have juſtified a biſhop in refuſing to admit him; and 3dly, That Moreton had another ſpecific legal remedy, by *quare impedit*, which was a complete anſwer to an application for a *mandamus*.

BY THE COURT. It will be too much to determine whether the defendants have a right to approve or reject *on affidavits*. And if the defendants are to be conſidered as truſtees, in executing that truſt they are to exerciſe a proper diſcretion, and to judge whether the party were or were not *idoneus*, as a biſhop may do in the caſe of a preſentative, and may abſolutely reject the nominee on account of his being illiterate, which queſtion of fitneſs cannot be tried by a jury, but of which he is the ſole judge. But as Mr. Moreton has been rejected on account of immorality and indecent conduct, that queſtion may be properly determined by a jury of his country, to whom he has a right to appeal on the truth of the facts alleged againſt him. If however thoſe facts are true, the defendants may return them upon the record. But as to the argument that Moreton has a remedy by *quare impedit*, the Court were inclined to think it would not lie, and were about to make the rule abſolute, but afterwards ordered this point to be again argued;—after which, on a future day, the Court gave judgment.

LORD KENYON, Ch. J.—It appears from the ancient roll, referred to in the affidavits, that certain proceedings had been had before the commiſſioners of charitable uſes, reſpecting the lands appropriated to the maintenance of the *curate; and* therefore it ſeems as if the inhabitants have only



only an *equitable right*; if ſo, this Court cannot interfere at all; or if the inhabitants have a *legal right*, ſuch right may be aſſerted in a *quare impedit*. Therefore *quâcunque viâ datâ* this rule muſt be diſcharged. Perhaps the better remedy will be, an information in the Court of Chancery in the name of the Attorney General. Suppoſing this had been a legal right, there is one caſe (in addition to thoſe cited) which my brother *Aſhhurſt* has found in *Raſt.* 506, *b*, which ſhews that a *quare impedit* will lie by the perſons having the right of nomination againſt him who has the preſentation, and who obſtructs the right. As to the caſe cited from 2 *Burr.* 1043, that was a *mandamus to be reſtored* to the curacy; there a *quare impedit* would not have lain, and the party applied for the only ſpecific remedy to make him curate *de facto*.

ASHHURST, J. of the ſame opinion.

BULLER, J.—This determination will not interfere with any of the adjudged caſes. For it appears to me on theſe affidavits, that this is a *truſt*, and therefore that the remedy is in a court of equity. A party applying for a *mandamus*, muſt make out a *legal* right; though if he ſhew ſuch legal right, and there be alſo a remedy in equity, that is no anſwer to an application for a *mandamus*; for when the Court refuſe to grant a *mandamus*, becauſe there is another ſpecific remedy, they mean only a *ſpecific remedy at law*.

GROSE, J.—This Court will grant a *mandamus*, where the party applying has no other ſpecific legal remedy, or if ſuch other remedy be obſolete. But here the party applying has no legal right; or if he have, it may be aſſerted in another legal mode.

Rule diſcharged.

REX *v.* MEIN.

This was an application for a *quo warranto* againſt the defendant, to ſhew by what authority he claimed to be portreeve of the borough of Fowey, in Cornwall; the relator produced an affidavit of the Recorder, ſtating Fowey to be an ancient borough, ſending members to parliament ſince the 13th of *Elizabeth*, and that the portreeve is the returning officer. That, by the conſtitution of the borough, ſuch perſons only have a right to vote at elections as are Prince's tenants, duly admitted upon the court-rolls of the borough and manor of Fowey, in right of the freehold eſtates within the

the borough, and who have done their fealty, and in ſuch inhabitants of the borough only as pay ſcot and lot. That the Prince of Wales, as Duke of Cornwall, is lord of the borough and manor. The affidavit then impeached the titles of fifty perſons, as having been improperly admitted at the laſt Court, held on the 26th of November, 1789; they having been admitted before any homage was ſworn, and *without any preſentment being made of their titles*; and becauſe the ſteward had ſworn-in 29 of thoſe newly-admitted perſons, together with the defendant, Thomas Mein, (who had before been admitted) upon the homage, for the purpoſe of preſenting the defendant to be portreeve of the borough, which they accordingly did; and he was ſworn-in immediately. In anſwer to which the defendant filed another affidavit, ſetting forth the method of electing the portreeve; and denying the cuſtom of admitting tenants to be as ſtated in the relator's affidavit: and ſetting forth three inſtances of admiſſions from the court-rolls, the only inſtances to be found for 150 years back, to the contrary.

It was contended, *inter alia*, againſt the rule, that the affidavit in ſupport of it having omitted to ſtate in whom the right of election to this office was, the proſecutor could not reſort to the affidavit on the other ſide to ſupply this omiſſion.

LORD KENYON, Ch. J.—If the matter had reſted on the relator's affidavit alone, I ſhould have been clearly of opinion that the information could not go: but upon conference with my brothers, I find that it is not unuſual to have recourſe to the affidavits againſt the rule in order to come (if poſſible) at the whole truth of the tranſaction. And I agree that in ſo doing we muſt not garble any ſentence referred to, ſo as to give it a different meaning from that which it naturally imports when taken altogether; but ſtill we are not bound to take the whole of it to be true, but merely to refer to it as evidence of certain facts. Now the relator's affidavit had omitted to ſtate in whom the right of election was to the office of portreeve, which chaſm is filled up by the defendant's affidavit, diſcloſing the method of election. Then the next queſtion is, whether ſuch an office as that of portreeve is of magnitude ſufficient for the Court to take notice of by way of information in the nature of *quo warranto*. Of that I cannot entertain a doubt. A portreeve, *ex vi termini*, implies a public peace officer, and he is here cloathed with that very important conſtitutional office of returning officer; that is perfectly ſufficient to bring him within the ſcope of this information. But then



then it is objected that the titles of electors cannot be impeached through the medium of the elected; and the case in *Cowper*, 507, has been relied on: but there the electors were members of a corporation. Whose titles might have been questioned in *quo warranto* informations; and there too Lord *Mansfield* laid considerable stress on the voters having been in the possession of their franchises for twelve years. At all events that rule cannot be extended to cases where the titles of those electors cannot be impeached at all; in such cases, of necessity their titles must be attacked by discussing the validity of the election made by them, in a proceeding against the person elected. Such is the case of a Coroner, who is elected by the freeholders of the county. Upon an information of this sort, the titles of the several freeholders who voted for him must come in discussion, and yet no such information lies against them for exercising a right incidental to the freehold. So in the case of a Steward of a Court-Leet. The same answer occurs here; it is a case of equal necessity. What sort of information could be framed against persons of the description of the Prince's tenants? They have an incidental power of electing the portreeve in the same manner as the freeholders of the county have with respect to the Coroner; and they are no more than freeholders. Lastly, it is objected that the evidence of the defendant outweighs that of the relator; now admitting it to be so, that has never been held to be an answer to an application of this kind. Where there is evidence on both sides, the Jury are the constitutional judges on which side the balance inclines; all that we are to look to is that a fair doubt is raised, and that the parties applying come with clean hands, and in proper time.

ASHHURST, J.—I entirely concur; and indeed I should have been of opinion that an information would have lain against the defendant to try his title to the office of portreeve, even if he had not been stated to be the returning officer.

Rule absolute.

COOKE

COOKE v. OXLEY.

This was a rule to ſhew cauſe why judgment ſhould not be arreſted, on the ground that there was no conſideration for the defendant's promiſe, in the following

CASE.

The defendant propoſed to the plaintiff that the former ſhould ſell and deliver to the latter, 266 hogſheads of tobacco at a certain price; whereupon the plaintiff deſired the defendant to give him time to agree to, or diſſent from, the propoſal till the hour of four in the afternoon of that day, to which the defendant agreed; and thereupon the defendant propoſed to the plaintiff to ſell and deliver the ſame upon the terms aforeſaid, *if the plaintiff would agree to purchaſe them upon the terms aforeſaid, and would give notice thereof to the defendant before the hour of four in the afternoon of that day.* The plaintiff averred that he did agree to purchaſe the ſame upon the terms aforeſaid, and did give notice thereof to the defendant before the hour of four in the afternoon of that day; he alſo averred that he requeſted the defendant *to deliver* to him the ſaid hogſheads, and offered to pay to the defendant the ſaid price for the ſame, yet that the defendant did not. &c.

At the trial a verdict had been taken for the plaintiff.

LORD KENYON, Ch. J.—Nothing can be clearer than that at the time of entering into this contract, the engagement was all on one ſide; the other party was not bound; it was therefore *nudum pactum.*

BULLER, J.—It is impoſſible to ſupport this declaration in any point of view. In order to ſuſtain a promiſe, there muſt be either a damage to the plaintiff, or an advantage to the defendant; but here was neither when the contract was firſt made. Then as to the ſubſequent time, the promiſe can only be ſupported on the ground of a new contract made at four o'clock; but there is no pretence for that. It has been argued that this muſt be taken to be a complete ſale from the time when the condition was complied with: but it was not complied with, for it is not ſtated that the defendant did agree at four o'clock to the terms of the ſale; or even that the goods were kept till that time.

GROSE, J.

GROSE, J.—The agreement was not binding on the plaintiff before 4 o'clock; and it is not ſtated that the parties came to any ſubſequent agreement; there is therefore no conſideration for the promiſe.

Rule abſolute.

DAY *v.* HANKS.

In an action on the caſe for diſturbing the plaintiff in his right of common, the declaration contained two counts, for diſturbances in two diſtinct commons; as to the firſt of which, the defendant ſuffered judgment to go by default: and upon the ſecond he took iſſue, and upon trial obtained a verdict.

The plaintiff afterwards obtained a rule *niſi* for the *poſtea* to be delivered to him, and for the Maſter to tax his coſts thereon.

And THE COURT were clearly of opinion that the plaintiff was not entitled to the coſts of the trial; but, whether the defendant was entitled to ſuch coſts, they ſaid would more properly come under conſideration upon a review of the Maſter's taxation: they therefore directed that the *poſtea* ſhould be lodged in the hands of the Maſter, that he might tax the plaintiff his coſts on the judgment by default, and tax the defendant his coſts on the verdict obtained on the ſecond count.

A rule was now obtained for the defendant to ſhew cauſe why the Maſter's taxation of coſts accordingly ſhould not be ſet aſide: and it was argued in ſupport of the rule, that as the plaintiff is entitled to judgment on one count, the defendant cannot have judgment for his coſts on the other; for then there would be two judgments, one for one party, and the other for the other party, on the ſame record.

BY THE COURT. There will be no incongruity in this caſe on the record. If the Court ſee two ſeparate cauſes of action on the ſame record, on one of which the plaintiff ſucceeds, and the other is found for the defendant, they are bound to give two diſtinct judgments. So in an action for an aſſault and battery againſt two defendants, if one ſuffer judgment by default, and the other juſtify and obtain a verdict, there muſt be two ſeparate judgments on the record. Here the plaintiff will have judgment up to the whole extent to which he is entitled, by having judgment for his coſts on the firſt count, as to which the defendant made default:

fault: and as to the other count, which contains a ſeparate cauſe of action, and which has been found for the defendant, he is equally intitled to have judgment for his coſts incurred by the trial of that iſſue.

Rule diſcharged.

CROSS v. SALTER.

At the Exeter Aſſizes an action upon the caſe was tried before Baron *Hotham*, brought by the plaintiff, who claimed a pew in his pariſh church, and complained that the defendant interrupted him in the enjoyment of it. Plea, the general iſſue. The plaintiff called witneſſes, who proved that he, and thoſe whoſe eſtate he claimed, had ſat in the pew between 50 and 60 years paſt, from the time that it was firſt built for one Richard Croſs; and that before that time there were long benches on the ſpot, on which the ſingers uſed to ſit. He alſo produced a ſentence in the Conſiſtorial Court of Exeter, dated January 26, 1787; and alſo the proceedings upon appeal to the Court of Arches, and the ſentence thereon in the ſame year; and the final ſentence of the Court of Delegates. The libel in the Conſiſtorial Court was exhibited by the preſent plaintiff againſt the defendant and his wife; wherein the proponent alleged that Richard Croſs, of Halberton, from whom he claimed, had, about the year 1736, built, at his own expence, the pew in queſtion, *in right of a certain meſſuage called Rowridge*, ſituate in Halberton, and had peaceably enjoyed the ſame, and repaired it at his own expence; and he complained againſt Salter's diſturbance of his *intereſt*, *right*, and *property* therein ſeveral times during the year 1785: that Court ſentenced "That J. Croſs (the plaintiff), had fully proved the purpoſe of his ſaid libel, &c. and that nothing effectual on the part of the defendants had been alleged or proved to the contrary, &c. wherefore it was *decreed that the pew in queſtion did belong to the ſaid plaintiff, as owner of a certain meſſuage called Rowridge*, in the ſaid pariſh of Halberton; that the defendant and his wife had intruded themſelves into it, and thereby diſturbed the plaintiff's right; and it admoniſhed the defendants to quit the ſame, and not to diſturb the plaintiff in his right of ſitting in the ſaid pew; it alſo condemned the defendants in coſts." Upon an appeal to the Court of Arches from this ſentence, that Court reverſed the former ſentence, and retained the principal cauſe; and by interlo-

cutory



cutory decree *admoniſhed the defendant and his wife not to ſit in the ſaid pew*, and condemned them in coſts. From this ſecond ſentence the defendant Salter and his wife appealed to the Delegates, on the ground that the Court of Arches had done wrong in retaining the principal cauſe, and in admoniſhing them *not to ſit in the pew*, and condemning them in coſts; that Court, on July the 6, 1789, diſmiſſed the appeal with coſts, and remitted the cauſe to the arches.

The defendant's counſel reſted the defence upon the ground that the ſentence of reverſal in the Court of Arches, (confirmed by the ſentence of the Court of Delegates), having a concurrent juriſdiction upon this queſtion with the courts of common law, was concluſive againſt the claim of *right*, ſet up by the plaintiff, and on which this action was founded; and the learned Judge being of that opinion, nonſuited the plaintiff.

A rule having been obtained to ſhew cauſe why the nonſuit ſhould not be ſet aſide, it was now argued, in ſupport of the rule, that as againſt a wrong-doer the plaintiff had proved his caſe by proving poſſeſſion; beſides which, the poſſeſſion of 50 years was ſtrong evidence either of a preſcriptive right, or of a faculty.

LORD RENYON, Ch. J. expreſſed a doubt, on the authority of *Kenrick* v. *Taylor*, 1 *Wilſ.* 326, whether poſſeſſion alone was not ſufficient againſt a wrong doer; and took time to conſider of the caſe; but on a ſubſequent day his Lordſhip ſaid the Court had looked into the proceedings in the Eccleſiaſtical Courts, which they were of opinion were not *concluſive* evidence; but what weight they would have on a trial, was not for their conſideration.

Rule abſolute.

REX *v.* JAMES HAIGH *and another.*

The defendants being overſeers of a pariſh in Yorkſhire were indicted before *Buller* J. at the Aſſizes for diſobeying an order of a Juſtice for the payment of a weekly ſum to one Mary Gray, for the maintenance of her baſtard child; and it was argued on the part of the defendants that the were not bound to obey the order as the mother refuſed to go herſelf into the workhouſe, alledging that ſhe aſked relief for the child only; though the ſtat. 9 *Geo.* I. Cap 7, §. 4. enacts that "in caſe any poor perſon in any pariſh where ſuch houſe

ſhall

ſhall be ſo purchaſed ſhall refuſe to be lodged, kept, or maintained, in ſuch houſe, ſuch poor perſon or perſons ſo refuſing ſhall be put out of the book where the names of the perſons who ought to receive collection are regiſtered, and ſhall not be entitled to aſk or receive collection or relief from the churchwardens and overſeers, &c."

At the trial a verdict was taken againſt the defendants, ſubject to the opinion of this Court.

LORD KENYON, Ch. J. The only queſtion is, for whom was the relief aſked? For ſuch perſon only is, according to the terms of this act of parliament, to be ſent to the workhouſe. It is ſtated that the *child* only wanted relief; the application was indeed made by the mother, but it was not on her own account, but for her child only who was of too tender an age to apply herſelf. This is therefore very diſtinguiſhable from the caſe of *Rex* v. *Carliſle*, *Doug.* 317, where the relief was aſked both for the parent and the child. It would be extremely hard, and contrary to the ſpirit and words of this act of parliament, if, when all the children of a family (except one) were capable of ſupporting themſelves, and that one were unable either from the want of reaſon or of the uſe of its limbs to maintain itſelf, and were under the neceſſity of receiving relief, the whole family were to be ſent to the work-houſe. Such a law would not only be repugnant to all ideas of mercy and humanity, but would alſo be prejudicial to the intereſt of the pariſh, who would in ſome meaſure be deprived of the benefit of the labour of ſuch of the family as were able to work; for they could earn much more out of the work-houſe than in it.

Per Curiam, Judgment for the proſecutor.

SMITH v. MULLER.

At the trial of this action there was a *reference of all matters in diſpute between the parties in the cauſe, and the coſts of the cauſe were to abide the event and determination of the award.* The arbitrator awarded and found theſe ſpecial facts; that the plaintiff ſued out the writ on the 14th of November 1788, returnable the 20th November, when ſpecial bail was put in; that the declaration was filed in Hilary-term, 1789, entitled as of that term, ſtating the defendant to be indebted to the plaintiff for uſe and occupation before the 1ſt January, 1789, and upon other counts; that 1*l.* 11*s.* 6*d.* became due at Chriſt-

mas,



mas, 1788, for a quarter's rent; that the defendant paid into Court all the rent due at Michaelmas 1788, and the plaintiff's other demands; that at Chriſtmas, 1788, he tendered the rent which became due at that time, which was refuſed: and that the ſum of 1*l.* 11*s.* 6*d.* was the whole ſum remaining due from the defendant to the plaintiff, after the payment of the money into Court.

The queſtion was, whether the declaration could include the rent which became due ſubſequent to Michaelmas term?

By THE COURT.—We are clearly of opinion that the declaration ſhould have been entituled of Michaelmas term; and that on application for that purpoſe they would have ordered it to be amended accordingly. The defendant therefore is not liable to the coſts.

BULLER, J. added, that notwithſtanding the difference between a reference "of all matters in diſpute between the parties in the cauſe," and "of all matters in diſpute in the cauſe between the parties," was now clearly and fully underſtood by the practicers of the Court, yet that the diſtinction was too refined for the general underſtanding of mankind; and therefore he thought it would be better to amend the terms of the reference thus: to make the former a reference "of all matters in difference between the parties," omitting the other words "in the cauſe;" and the latter a reference of "all matters in difference in the cauſe," omitting "between the parties." With reſpect to this particular caſe, it is the clear and undoubted practice of the Court that the declaration ſhould have been delivered as *of* the term when the writ was returnable. According to the ancient practice the declaration was actually delivered in the ſame term; it was only in eaſe of the plaintiff that the time of actual delivery was enlarged; but ſtill it muſt be conſidered as delivered *nunc pro tunc*. As to the practice of declaring, by the bye, that goes on a different ground: a declaration by the bye is not on the original writ: but the party being in Court in one action, a plaintiff may declare againſt him in another within two terms. Neither does any difficulty ariſe from the practiſe of pleading in abatement; for under ſuch circumſtances as the preſent the defendant might have entered a ſpecial imparlance, if neceſſary, or he might have filed the plea in abatement as of the Michaelmas term. Then as to the laſt caſe put at the bar of the action againſt two defendants, ſuch a caſe cannot exiſt on one writ. For if both defendants are ſerved before the return of the writ, and one of them do not appear in the ſame term, he muſt plead as of

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the term when he ought to have appeared, and if he be not ſerved before the return of the writ, the plaintiff muſt ſue out another writ.

Rule diſcharged.

LITTLER *v.* HOTLAND.

The plaintiff covenanted to build two houſes for the defendant for 500l. on or before the 1ſt of April, 1788. An action was brought for the payment of the 500l. at the Stafford Aſſizes, when it appeared that the work was not completed on the firſt of April, 1788; but that the parties by a parol agreement, after the date of theſe articles, enlarged the time; and that the whole work was finiſhed before the expiration of that enlarged time. On an objection taken by the defendant's Counſel that this did not prove the allegation in the declaration, which ſtated that the houſes were built by the 1ſt of April, according to the agreement, the plaintiff was nonſuited.

LORD KENYON, Ch. J.---This point is ſo clear, that I am not inclined to grant a rule to ſhew cauſe. The declaration charges that the parties had ſtipulated by deed to perform a ſpecific thing on a certain day: then if the plaintiff, who ſues on that contract, be not bound to prove it as laid, the defendant has no notice of that which he had called upon to anſwer. I remember an action being brought many years ago by Mr. Garrick, of one of the managers of the theatre, againſt Barry for not performing his contract; it appeared on the trial that the manager had given the defendant a *parol* licenſe to be abſent, but as the articles, on which the action was founded, required ſuch a licenſe to be *in writing*, the Court held that it could not be diſpenſed with, and that the parol agreement was no anſwer to the plaintiff's action; though perhaps the defendant had another remedy in a court of equity.

BY THE COURT, Rule refuſed.

ELIZABETH

ELIZABETH CHAPMAN, *verſus* WILLIAM SHAW, *Attorney at Law. Action of Damages for a Breach of promiſe of Marriage; before* LORD KENYON, *in the* COURT *of* KING'S BENCH *May* 22, 1790.

Counſel for the plaintiff.

Mr. MINGAY,

Mr. GARROW.

For the Defendant.

Mr. ERSKINE,

Mr. LAW.

Mr. MINGAY,

I am Counſel for Miſs Chapman; ſhe is the daughter of a very reſpectable tradeſman; you will find by the evidence which I ſhall produce to you, that the defendant uſed every little art and addreſs by which men too often get poſſeſſion of the affections of the other ſex. He from time to time, viſited the family, and repeatedly promiſed to marry this lady. You will find by his letters, and by the evidence of a great number of perſons, he pretended it was impoſſible for him to enjoy any happineſs in this world without marrying her; and in this manner he got complete poſſeſſion of her affections; he kept up this intimacy with her until the very time that he was married to another lady; he repeatedly ſaid that he would marry her, although contrary to the inclinations of his family; and, immediately after, to her utter ſurpriſe, the plaintiff found that he had married a young lady in Yorkſhire; what fortune induced him to this marriage, I know not, although I ſhall be able to give general evidence of his ſituation and circumſtances. It is not poſſible to aggravate a caſe of this kind by any obſervations I can make. There cannot be a more unjuſt, a more unmanly conduct, than for a man to ſeduce a woman's affections by every little art and ſtratagem, when at the ſame time he has

no ſerious intentions of marrying her, and I truſt you will mark it by your verdict. I ſhall call witneſſes, and prove my caſe; and then you, Gentlemen of the jury, will give to this young lady ſuch a ſatisfaction in damages, as the nature of the caſe ſeems to require.

Mrs. MARY CHAPMAN, *ſworn.*

The plaintiff is my daughter. From the latter end of Auguſt, 1787, to the latter end of July, 1789, Mr. Shaw paid his addreſſes to her; during all that time ſhe reſided in my family. During that time, except about ten weeks, when he was in the country, he was every day at our houſe; he was received with approbation by my huſband and the reſt of the family; he was treated as a ſuitor to my daughter; he entered into a converſation with me reſpecting his intentions towards my daughter about the latter end of July, 1788; ſays he, "Mrs. Chapman, I and Miſs Chapman have agreed to be married." I anſwered---"Well---I approve of it." I then turned about to him, thinking that he was going to ſay ſomething more upon the ſubject. He looked a little *ſhy*, and ſaid, "I thought, Madam, it was beſt to acquaint you with it." This was all the converſation that paſſed at that time in the parlour. Mr. Shaw then went up ſtairs, and I followed to the room where my daughter had her muſick, and where ſhe ſlept; "My dear," ſaid he, addreſſing himſelf to my daughter, "I have acquainted your mother at laſt." "What did you ſay?" ſaid ſhe. "I have told your mother," ſaid he, "that you and I have agreed to be married."---I turned into the other room, where my huſband and I ſlept. I thought I would not interrupt them. About an hour after that he went away. I do not know that I had any converſation with my daughter, on this ſubject, that night. The next day was Sunday, when Mr. Shaw was again at our houſe---he was at our houſe every day; he ſaid he would communicate every thing to Miſs Chapman, and open to her all his future hopes and proſpects in life; he took leave, very kindly, of all my family when he went into the country for the vacation. I think I ſaw him again about the middle of October following. Mr. Shaw and my daughter were extremely fond of one another. After his return from the country, he ſaid, "Miſs Chapman, I'll bring your brother-in-law to ſee you;" meaning his own brother. He turned about to me, in the preſence of my daughter, and ſaid, "Mrs. Chapman, I'll bring my brother to ſee you." I ſaid, "Sir, I ſhall be very glad to

ſee



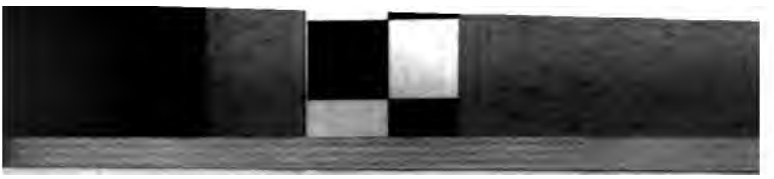
ſee him, and be proud of his company." In a ſhort time after this, he brought Mr. John Shaw to my houſe. Mr. Shaw, the defendant, had chambers, and I was preſent at a converſation in my houſe, when he ſaid "Miſs Chapman, will you go and ſee how you like my chambers?" This was in the month of May, 1788. "Pray," ſaid he, "go and ſee whether they will do for us." He was at this time in poſſeſſion of the chambers. He then turned about to me, and ſaid, "Mrs. Chapman, won't you go and ſee my chambers?" I anſwered him, "I have no notion of ladies going to ſee gentlemen's chambers." After his return, in the month of October, he continued for ſome time to pay his attention to my daughter. He married in October, 1789, at the diſtance of a year. I never ſaw any alteration in his behaviour. I know no reaſon that my daughter gave him to break off his connexion. I did not ſuſpect any more than the firſt moment he was in her company. I had not the leaſt ſuſpicion that he was courting another lady, until about two months before he was married. He married a Miſs Wright. My daughter is twenty-three years of age; Mr. Shaw is about twenty-four or twenty five years of age, and is an Attorney. On the 16th of December, Mr. Shaw ſent for me to Mr. Brown's; ſaid he, "Mrs. Chapman, I acquainted you with the affair between Miſs Chapman and me." "Certainly you did," ſaid I. "You told me that you and Miſs Chapman had agreed to be married." I then upbraided him with every thing I could think of, and aſked him how he could do what he had done; he ſaid he was very ſorry for it; he was very ſorry he was married, for that Miſs Chapman was a very virtuous young lady, and of ſtrict integrity; he had no fault to find with her, nor with any belonging to her; he then had on a ring with ſome of my daughter's hair in it; he ſaid, he knew he had acted very cruelly to her; he was very willing to make her a recompence. He ſaid he had no fortune with his wife, but about an hundred pounds. This converſation paſſed in the preſence of Mr. Brown. Mr. Brown ſaid, "Mr. Shaw, you would have had a deviliſh deal more with Miſs Chapman." He ſaid he wiſhed he had known; that he had got no property of his own. I aſked him what recompence he could make her. He ſaid, he would make her a yearly recompence. I upbraided him with the injuſtice and unmanlineſs of the whole of his conduct.

Croſs-examined by Mr. Erſkine. My huſband is a chairmaker. I have eight children; three of whom are daughters.

In the month of July, 1788, my ſon was fellow-clerk with the defendant; he introduced him firſt into our houſe. He ſaid, "Mother, I ſhall have a gentleman or two, and hope you will make a little entertainment." I ſaid, I would. After Mr. Shaw had viſited at our houſe for ſome time, I obſerved him pay a particular attention to my daughter. I knew perfectly well who he was: he was clerk at the office of Mr. Sharples; he was out of his clerkſhip. In July, 1788, he ſaid he was a man of no fortune. I never aſked him what fortune he had, during the twenty-three months courtſhip which he paid to my daughter. I never adviſed my daughter to diſcourage his addreſſes: I knew his family, that it was a very reſpectable one; and he ſaid, he was the twelfth brother. Having a knowledge of his family, I did not think there was any neceſſity in writing to his father or brother. I had a mind the young people ſhould do as they pleaſed. As I ſaid before, Mr. Shaw introduced his brother to us, one evening, about ſix o'clock. I believe he drank tea; and my huſband ſhook hands with him. The defendant was under this brother's protection. I received him as I would have done any other gentleman. When the defendant went into the country, he wrote directly to my daughter. It was before he went into the country, that he introduced his brother. I was not at all ſurpriſed, when he deſired my daughter to go and ſee his chambers, becauſe I then looked upon him as much my daughter's huſband, as if he had actually been married to her. After Mr. Shaw was married, he ſent for me. He ſaid, Miſs Chapman was a lady of great virtue and integrity; that he was very ſorry he was married; and was willing to make any reparation in his power to my daughter. He had only a ſmall property with his wife. He had only an hundred pounds, and no property of his own.

The defendant went every where, where we viſited: he viſited with us at Mr. Neal's, and all our acquaintance. We have married three of our family already. We gave each of them a portion of ſeveral hundred pounds; and this daughter would have got the ſame. After Mr. Shaw diſcontinued his viſits to my daughter, *ſhe was out of her mind two months.* She kept her bed, and never ſlept for *ſeven days.* She was ill twice; and this illneſs was manifeſtly occaſioned by Mr. Shaw's breaking off his viſits. In expectation of marriage, I laid out 30l. with a linen-draper, and 12l. for ſilk with another.

Richard



Richard Chapman ſworn.

I am brother to the plaintiff. I knew of Mr. Shaw's viſits to my ſiſter. The conduct of the defendant was ſuch as left me no doubt but that he had gained her ſincere affections. One day, he was counting how many months it would be to July, when he ſhould go to the country; "And when I return," ſaid he to my ſiſter' "we ſhall be married, Liz."

Croſs-examined. They were to be privately married in November. I do not know from whom I underſtood this. I have heard it ſince the action was commenced.

Mr. Chapman ſworn.

I am the elder brother of the plaintiff. I know Mr. Shaw, and have ſeen him frequently at our houſe. I always received him as a perſon paying his addreſſes to my ſiſter; and he was ſo received by all the family. There appeared to me to be a great attachment between them. She was ill, in conſequence of his diſcontinuing his viſits, and was attended by a medical perſon. Mr. Shaw was acquainted in our family for eighteen or twenty months. He told me, he was a clerk, *for improvement, for eighteen ſhillings a week!* My brother was clerk with Mr. Sharples. I do not know that Mr. Shaw was fellow-clerk with my brother. He never ſtated, in my hearing, his intention of marrying my ſiſter. I remember this young man's brother coming to our houſe; he was there moſt of the evening. I do not know that there was a word ſaid by this young man, that he was going to be a huſband to my ſiſter. I cannot ſay that he was at our houſe in the ſummer of 1789, but know that he was there one evening between eleven and twelve at night. My ſiſter made a complaint of it to me.

Croſs-examined. The defendant is an attorney, and lives in Thanet place. He was in our houſe in 1789, about a fortnight before he went into the country. In the months of January and February, 1789, he was in London and never viſited us: he then lived in New-Inn. I never ſent to ſee what was become of him; and, as far as I know, my ſiſter never called or ſent to him.

Mr. Turney Sworn.

I am an apothecary, and attended Miſs Chapman for ſome months in the year 1789, when ſhe was very ill. Her mind was diſordered: her diſorder was the effect of an unhappy mind.

LORD

LORD KENYON. I muſt undoubtedly take it for granted that the plaintiff was ill in conſequence of her great attachment to the defendant.

Mr. Erſkine. I wonder to what extent the myſterious ſcience of medicine will arrive at laſt. I believe they will follow it by and by to the next world.

Charles Chapman ſworn.

I am brother to the plaintiff; I know Mr. Shaw the defendant; during the latter period of his viſits at our houſe, he did buſineſs for himſelf; he was agent for his two brothers, and he did buſineſs for another gentleman whom I knew.

DEFENCE.

Mr Erſkine, Counſel on the part of the defendant, then addreſſed the Jury.

Gentlemen,

What is paſſing before us in this Court at preſent, is a miniature of what is paſſing in the world at large; (as ſcenes in private life ſomething reſemble thoſe which are acted in publick) I ſhall endeavour to defend my client againſt this family compact. I will preface what I am about to ſay to you, with an obſervation which I give you my word of honour is a ſincere one. There is no man living, who feels more regard than I do for the honour of WOMEN; or who enters more ardently into their diſtreſſes: there is no man living who more pathetically laments ſeduction; or would more willingly hold up to public deteſtation their ſeducers. No man reſpects private life more, or thinks higher of the peace, happineſs, and proſperity of families who are engaged in the lower, but I think in the moſt uſeful walks of life; namely, thoſe who are engaged in trade. And therefore, I am ever ready to allow that any tradeſman who has ſuſtained an injury, has a right to be heard and to be attended to by a Jury of his country. I am only ſorry to remark, that the conduct of theſe witneſſes does not much credit to that purity, honour, and fairneſs of dealing, which are often found in theſe walks of life. You have before you the defendant, Mr. Shaw, who is a young man juſt coming into the world, endeavouring to provide for himſelf, and to forward his fortune. Gentlemen of the Jury, many of your connexions may probably be in the ſame ſituation. The youngeſt of twelve children, thruſt out into the world to ſtruggle againſt all the viciſſitudes of fortune, and to hold

hold out againſt all her vanities and caprices. My client was ſent out into the wide world to ſeek his maintenance at the age of nineteen. For a ſhort time he was clerk to an attorney, and in the ſame office with one of the brothers of the preſent plaintiff, who firſt introduced him into his family. Mr. Chapman, although he is the father of this family, and the head of this houſe, has not been ſummoned as a witneſs in this cauſe. In caſes of this ſort women are better witneſſes than men, and Mrs. Chapman has conducted herſelf better than her huſband could have done; women concern themſelves more with theſe little attentions which are paid to their ſex by men; and therefore, they are more competent witneſſes. But when you come to a ſerious connexion, the huſband moſt undoubtedly muſt be conſulted: becauſe, by the law of England, you muſt obtain the conſent of the lady's father.

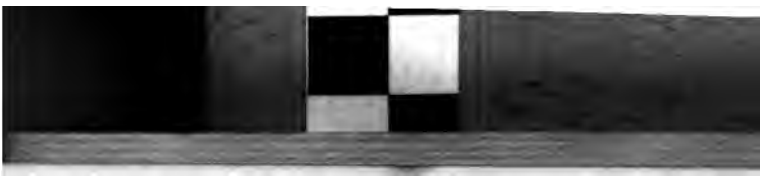
Mr. Mingay. The lady is of age.

Mr. Erſkine. She may be of age; but if there had been any ſerious intention of a marriage, the father would certainly have been acquainted with it. You will obſerve, Gentlemen, that during the period of *twenty-two months*, Mr. Shaw viſited at the houſe of Mr. Chapman, paying thoſe attentions to his daughter which young men, at that time of life, uſually pay to the young women whoſe company they keep. And although the parents knew he was a clerk at eighteen ſhillings a week, the mother tells you ſhe never warned her daughter againſt forming an attachment to him, although, as he had no fortune, ſhe muſt have ſeen that this marriage would never have produced any deſirable effect. But it ſeems to be a principle with this family to diſpoſe of their daughters in marriage as ſoon as they can, and how they can; it would be better for them to deſiſt from this mode. People ought never to join themſelves in marriage without having the means of a comfortable ſupport; for no proverb is truer than this (and there is a great deal of truth in moſt proverbs), "When poverty comes in at one door, love goes out at another." This is a very innocent and a very virtuous young woman. And if ſhe has been unhappy, ſhe is yet more happy than ſhe would have been if ſhe had married Mr. Shaw. The firſt time was the 7th of July, 1788, when, according to the evidence of the mother, the defendant expreſſed an intention to marry her daughter. I aſk you, Gentlemen, for I know your honour and juſtice will make you extremely attentive; did ſhe mention the converſation that paſſed between the defendant and her to her huſband? Has ſhe ſtated her huſband ever ſig-

nified



aſſent his approbation to my client that he ſhould marry his daughter? She has concealed this part of the ſtory which this young man told her, that he had no property, and deſired her to communicate this to her huſband, to acquaint him that unleſs it would be convenient for him to give his daughter a fortune, it would be impoſſible to carry on this engagement. And from that time, not a ſyllable paſſed which conveyed an inclination or deſire on the part of the parents to carry this marriage into effect. This was in July, 1788. He went into the country; and what correſpondence has been produced from him in his abſence? They have been able to produce *one* letter from this *ardent* lover, during the abſence of three months. This young woman was ſuppoſed to have had ſuch an affection for the defendant, as to have turned her brain. If ſo, when he returned to London, I ſhould think he would have been a little reprimanded by his lover, for neglecting to correſpond with her. He returned to town in the end of the year 1788. Between two and three months in the ſpring of the ſame year, he is living in New-Inn; he is never once at the houſe; he is never viſited by her; he is never inquired after by the parents, although in the month of July before, it was announced to the mother by the defendant, that his marriage was to be carried into effect in the month of November; then, ſaid my client, I ſhall be married to Liz. It was a great pity Mr. Neale was not preſent at this converſation, which paſſed at the houſe of the parents before he went away. No! he could not get him to the houſe. Mr. Shaw ſaw the folly and danger of the connexion, and the ruin that it would bring on both him and this young lady. Mr. Shaw had unfortunately deſtroyed a letter written by Miſs Chapman to him, acknowledging that this connexion ought to be deſtroyed and put an end to by abſence, or in any ſhape. Here is a meeting at the houſe of Mr. Neale; this young gentleman, one of the brothers of the plaintiff, is preſent at this converſation, and ſwears that Mr. Shaw ſaid he would marry Liz in November. Mr. Shaw comes back in November: Did Mr. Chapman ever put Mr. Shaw in mind of his promiſe? Had Mr. Chapman no regard for the honour of his ſiſter? Had he no regard for the reſpect due to his family? Did he never ſay to his mother, What is become of Shaw? He has returned, and yet has never performed his engagement? I aſked the mother and all the three ſons, for this action is carried on at the family expence, and with family witneſſes, and no one would ſwear this man is fixed with this breach of promiſe; but this is



not all; no perſon who attends, in the ſmalleſt degree, to the manner in which this buſineſs has been conducted, but muſt ſee that this is a cauſe trumped up againſt a young man, who is obliged to marry againſt his own will, who would have much rather married this young woman, but was prevented, becauſe there was no property on either ſide.

Gentlemen, if any of you had a ſon, and had no property to give him, and who was to work his fortune through the world, and ſhould form an attachment to any tradeſman's daughter, would you not expect, from the fairneſs and honeſty of people of this deſcription, to have had ſome communication on the ſubject? Would you not have expected ſomething to this effect? Your ſon has viſited my daughter; a new connection has ſprung up between them: is it for the advantage of either or both? Common honour, common honeſty, called for ſuch a communication. I ſhould conſider it as a conſpiracy againſt me, if any family were to permit a ſon of mine to form an attachment to one of their daughters, and never communicate it to me. If, in conſequence of ſuch an acquaintance, he ſhould form an injudicious connexion, I ſhould conſider it as a conſpiracy, if not made acquainted with it. By the law of England, a father who has a ſon under age, is intitled to ratify the contract of marriage, and if performed without the conſent of the father, it is no engagement. It is evident that this family, I do not ſay wickedly, but fooliſhly, ſuffered my child to go on in forming an attachment to their daughter, without either directly or indirectly communicating it to any branch of my child's family.

This is not all; you are deſired to believe, by Mrs. Chapman, that the defendant ſaid to her, I will bring my brother, Mr. Shaw, to viſit you. The defendant was to introduce his brother as a brother-in-law; as a man who was to be received with open arms, and taken into the affections of this family. She tells you, ſhe addreſſed Mr. Shaw as ſhe would any one of you. He remained from ſix or ſeven in the evening, until twelve o'clock at night; the father preſent, the mother preſent, all the brothers preſent, the man himſelf preſent, who promiſed to marry the young lady, when he returned in November; and yet not a ſyllable is ſaid on the ſubject.

When the defendant comes back in November, 1788, he was to be married privately firſt.—Why?—They tell you he was of age, and ſhe was of age; why then a *private* marriage? Was it to conceal it from his own family before

his

his parents and his numerous brothers could come and enter their proteſt againſt a connexion which would involve both the parties in ruin? This is the true ſituation of the buſineſs; but you will obſerve further, one of the brothers ſays, they were to have been married *privately*. Why, when he came to town, was not this taken notice of? There is not a ſyllable of evidence in the cauſe, of his ever having been called on to carry this marriage into effect. Mr. Shaw's affections were undoubtedly fixed on Miſs Chapman, but he had no fortune. Did Mr. Chapman ever offer him a fortune with his daughter? Mrs. Chapman knows that ſhe concealed a part of the converſation between her and the defendant, who deſired her to aſk her huſband what he would give, and yet this man, Mr. Chapman, is kept in the back ground; why was he not ſworn, ſince he could have thrown light upon the ſubject? Then comes the apothecary in Macbeth, ſhaking his head, with a portentous air, and whirling his fingers about like ſome conjuror. When phyſicians cannot find any diſorder in the body, they ſay there muſt be ſome diſorder in the mind; the greateſt phyſicians that adorn the world and ſcience, when they go out of the path of experimental philoſophy and truth, only make aſſes of themſelves in the face of the public, and will make every man laugh at them, who becomes acquainted with their preſumption aad ridiculous folly.

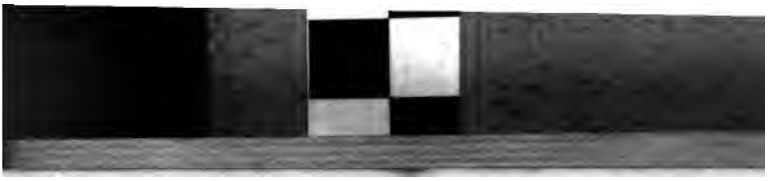
Gentlemen, you may give the plaintiff a verdict of ſixty or ſeventy pounds; you may caſt my client into priſon; you may make another family unhappy, for there is another unfortunate woman; and if there has been any crime committed, ſhe has not partaken in it.

Gentlemen, the defendant ſtands in the ſame ſituation in which I am afraid we have all, at one time or other ſtood; we have caſt our affections into a quarter where fortune has not caſt her ſmiles. The law undoubtedly has put the whip into your hands, and feeling like diſcreet, honourable men, like men of humanity and juſtice, I am ſure you will make a proper and moderate uſe of it.

LORD KENYON'S *Charge to the Jury.*

Gentlemen of the Jury,

This cauſe lies in a very narrow compaſs. There are two points in it. Firſt, Whether the promiſe ſtated by the plaintiff, and made to her, has been broken? and Secondly, *What are* the damages? If any perſon who enters into this en-



engagement, is reputed to be of ſober life and converſation, but who turns out, on a fair inquiry, to be a woman whoſe character is ſtained, the promiſe, although made to her, will not bind the other party in point of law. If a lady is chaſte and virtuous at the time of making the promiſe, but, before the performance of it, acquires a different character, there is in this caſe likewiſe an end of it: but nothing of this kind appears in the preſent caſe; and the learned Counſel for the defendant ſeems to admit that the verdict muſt be for the plaintiff, and undoubtedly it muſt; and then the queſtion ariſes reſpecting damages. And, Gentlemen, it is ſcarcely neceſſary to mention, that you ought always to have reſpect to the ſituation in life of the perſon who is to pay theſe damages. The conduct of the defendant during this buſineſs does not appear to me marked with any peculiar delinquency. Too often, indeed, an improper intimacy, by the inattention of parents, has happened; the daughters have been ſeduced; but fortunately, in this caſe, nothing of that ſort has occurred. It was a pleaſing dream; but the defendant was at laſt awaked from it, from a view of his own ſituation: this, however, does not juſtify him in breaking his promiſe, but preſents him to you in a ſituation more favourable. His ſituation in life is certainly very narrow; he is living upon the ſmall earnings ariſing from the profeſſion to which he has been bred up; he is now connected with another woman. Whether he is the father of a family or not, I do not know; but he is the huſband of a wife; and you will undoubtedly advert to that ſituation. I do not ſay, always, that a man who cannot pay in his purſe, ſhall not be called upon to pay in his perſon. However, the defendant does not appear to you in that criminal ſituation in which ſeveral others have been placed.

Gentlemen, You are now acquainted with all the circumſtances of this caſe. The conſequence of large damages will not be productive of much benefit to the plaintiff; at the ſame time, they may cruſh the defendant. You are the ſole and only conſtitutional judges of what the damages ſhall be. You will attend to the ſituation of the parties, and, I am ſure, will do ſubſtantial juſtice.

Verdict for the plaintiff, Twenty Pounds.

Sessions Case determined in the Court of King's Bench, ſubſequent to the Publication of the laſt Edition of Burn's Justice.

Rex v. Thomas Forrest, *and Others.*

C A S E.

An appeal was made to the Quarter Seſſions of Middleſex by John Abrahams, and two other perſons, on behalf of themſelves and the reſt of the pariſhioners of St. Pancras, againſt a warrant of appointment, made by four juſtices, of Thomas Forreſt, John Powell, and one Jones, to be overſeers of the poor of that pariſh: and a ſpecial caſe was reſerved for the opinion of the Court. The appellants exhibited their petition and appeal, ſetting forth that the pariſhioners of St. Pancras had always been accuſtomed to aſſemble in open veſtry on Tueſday in Eaſter week, in purſuance of a notice given, for the purpoſe of returning proper perſons to the Magiſtrates of the diviſion, to be by them appointed to the offices of church-wardens, overſeers, and conſtables. That there being three diviſions with a ſeparate overſeer for each, and two or more perſons having always been nominated for each diviſion, the pariſhioners had always proceeded to make their election by voting; and on a return being made by the veſtry-clerk of the proceedings to the magiſtrates, they had invariably appointed ſuch perſons as had the majority of votes. That on Tueſday in laſt Eaſter week, a number of pariſhioners attended, and ſix perſons were put in nomination for the office of overſeer for the enſuing year: that there appeared for one Hall 136; for Young 118; for Forreſt 94; and for Powell 79 votes: yet Jacob Leroux, Eſq. an acting magiſtrate in that pariſh, who attended the veſtry and voted, without waiting for the return, ſigned a warrant, appointing the ſaid Forreſt and Powell, together with one Jones, overſeers for the enſuing year; and then ſent ſuch warrant to three other juſtices, that they might ſign it, who ſeparately ſigned the ſame at their reſpective houſes. That the appointment ſo made in favour of the perſons in the minority being in direct oppoſition

poſition to the uſual cuſtom in the pariſh, and without any cauſe, inaſmuch as Hall and Young were in every reſpect eligible to the office; and the warrant being alſo illegally ſigned, the petitioners conceived themſelves aggrieved.

On hearing the appeal, it was objected by the reſpondents that no ſuch appeal from pariſhioners, not included in the appointment, lay: which objection was over-ruled. It was admitted by the reſpondents that the warrant was ſigned by one of the juſtices, and then ſent by him to the three other juſtices, who *ſeparately ſigned* the ſame at their reſpective houſes; and that no two of them had ſigned it in the preſence of each other. Whereupon the Court of Seſſions vacated the order of the ſaid juſtices.

On a rule to ſhew cauſe why the order of Seſſions ſhould not be quaſhed,

Fielding and *Garrow*, againſt the order of Seſſions, abandoned the queſtion relative to the uſage which was ſtated in the caſe, becauſe it was in direct oppoſition to the 43d. *Eliz.* cap. 2. but made two objections to the order of Seſſions. 1ſt, That nobody but the perſon who was appointed overſeer could appeal under the 43d. *Eliz.* cap. 2. That no other line could be drawn, otherwiſe every pariſhioner might appeal, and even upon ſeparate grounds; but it never could have been the intention of the Legiſlature to open ſuch a door to litigation. 2dly, The appointment was good, notwithſtanding all the Magiſtrates did not ſign it together. In the caſe of an order of removal, where the Juſtices are to examine into the facts, and make an adjudication with reſpect to the ſettlement of the party to be removed, it is neceſſary that they ſhould act together, becauſe they form a Court of Judicature and pronounce a judgment: but that is different from the preſent caſe, where the ſigning of the appointment is a mere miniſterial act. No examination of witneſſes takes place; and they merely approve of the nomination of the pariſhioners; which may be done as well when they are acting ſeparately as when they are together.

LORD KENYON, Ch. J.—The clauſe in the 43d *Eliz.* is conceived in the moſt general terms. It enacts that, "if *any perſon* ſhall find himſelf aggrieved, &c. he may appeal, &c." A caſe may reaſonably be imagined to exiſt in which the pariſhioners would feel themſelves aggrieved by the appointment of overſeers, when we recollect the enormous ſums of money which are received for the relief of the poor; as, for inſtance, if the Magiſtrates were to appoint perſons who were inſolvent. As to the other queſtion: perhaps at this

time

time of day no great inconvenience would follow from permitting the appointment to be made by a ſingle magiſtrate. But we are to decide this queſtion on the ſtatute 43d *Eliz.* cap. 2. the firſt ſection of which expreſsly declares, that the overſeers ſhall be nominated by two or more juſtices of the peace, *whereof one ſhall be of the quorum.* Now thoſe words are very material in the deciſion of a queſtion ariſing upon this ſtatute. For though in modern times all the Juſtices in the commiſſion (except one) are of the *quorum*, yet at the time when that act paſſed, ſome perſons were ſelected on account of their ſuperior knowledge, and appointed to be of the *quorum*. However, I do not wiſh to decide on that ſort of argument. But it is admitted that in the caſe of orders of removal, they muſt act together, and for this reaſon, that they ſhould aſſiſt each other, and that the reſult of their conference ſhould be the ground of their determination. Now I cannot diſtinguiſh this caſe from that. This is not merely a *miniſterial* act: if it were, like ſigning a rate, that might perhaps vary the queſtion: but it is a *judicial* act, wherein the Juſtices are to exerciſe a diſcretion. And, in order to make this a good appointment, the Juſtices ſhould have acted together. With reſpect to the uſage which is ſtated in the caſe, no queſtion can be entertained about it; becauſe as the ſtatute 43 *Eliz.* commenced in the time of legal memory, no uſage can prevail to oppoſe it.

ASHHURST, J.—The Juſtices in appointing overſeers do not act miniſterially; the ſtatute has veſted a diſcretion in them, and they ſhould act together. And, it being a matter of diſcretion, they ſhould confer together for the purpoſe of a communication on the ſubject matter on which they are to determine: but this cannot be done when they are not together, and when no conference can take place. On the other point, I agree with my Lord.

GROSE, J.---The uſage which has been attempted to be ſet up in this caſe, is contrary to the ſtatute. Neither can any doubt be entertained on the queſtion relative to the appeal. As to the other point, I agree that the Juſtices ſhould be together when they ſign the appointment. This is not a mere miniſterial act; if it were, the Juſtices would have nothing more to do than to confirm the appointment preſented to them by the pariſhioners: but they are to exerciſe a diſcretion upon the ſubject. And the general rule is, that, when an Act of Parliament requires the concurrence of two magiſtrates they ſhould both act together. This point has been determined not only in the caſe of orders of removal,

but

but in orders of baſtardy alſo, in *Billings* v. *Prim* and another, in the Court of Common Pleas.

Rule diſcharged.

CROWN CASES.

WILLIAM MORRIS'S CASE.

At the Old Bailey in July Seſſion, 1787, George Horne was indicted on the ſtatutes of 12 *Anne*, cap. 7, and 2 *Geo* II. cap. 25, for ſtealing two Bank Notes in the dwelling-houſe of Stephen Sullivan, Eſq. the *property* of the ſaid Stephen Sullivan; and William Morris ſtood charged in the ſame indictment on the ſtatutes of 3 *Will.* and *Mary*, cap. 9, § 4, and 5 *Anne*, cap. 31, § 5, for receiving the ſaid Notes, the *property and chattels* of the ſaid Stephen Sullivan, he the ſaid William Morris well knowing the ſaid *notes and chattels* to have been feloniouſly ſtolen. There was another count, charging William Morris as an acceſſary after the fact, at common law, with harbouring and maintaining the principal felon.

The priſoners were found guilty on all the counts, (except that which charged Morris as an acceſſary at common law) on very clear and ſatisfactory evidence; but the Counſel for William Morris ſubmitting two objections in his favour to the Court, they were extremely well argued both for the priſoner and for the Crown; and the Court reſerved the caſe for the opinion of the TWELVE JUDGES.

On the 14th of November following all the JUDGES, except Lord MANSFIELD and Lord Chief Baron EYRE, aſſembled at Serjeants-Inn-Hall, and the caſe was again argued by Mr. Knowlys on behalf of the priſoner.

Firſt Objection: There is a fatal variance in the indictment, between the count againſt the principal, and the count againſt the acceſſary. The firſt charges the things ſtolen to be the *property* of Stephen Sullivan, and the ſecond charges them to be the *notes*, *property*, and *chattels* of Stephen Sullivan. There cannot be an acceſſary for receiving ſtolen goods, unleſs the goods ſtolen are of ſuch a kind as are legally included within the meaning of the words "goods and

and chattels;" for no other kind of goods can be the ſubje of larceny. The word *property* is not ſynonymous wi *goods or chattels*; for a man may have a property in man things which, in reſpect of the vileneſs of their natur are not the ſubject of theft, as maſtiffs, blood-hound cats, monkeys, &c. So alſo, if they reſpect the realty, a a box in which charters are contained, although the bo may be of great value, and, if ſtolen without the charters i it, would have been the ſubject of an indictment of larcen The framer of the indictment therefore having confined th ſubject of it by a certain *deſcription*, it ſhall not be now pe mitted to define the thing ſtolen more ſtrictly in the charg againſt the acceſſary than they have done in the charge again the principal: being called *property* as to the *principal*, it ca not be conſtrued *chattels* as to the *acceſſary*.

Second objection: The receiving of Bank Notes, know ing them to have been ſtolen, is not felony, either by the com mon law, or by the ſtatutes on which the charge againſt th acceſſary is founded. The receiving of ſtolen goods wa at common law, a miſdemeanor only; and a man coul not be guilty as an acceſſary after the fact, except by receiv ing the felon himſelf. But it is enacted by the ſtatutes c the 3 *Will.* and *Mary*, cap. 9, § 4; and 5 *Anne*, cap. 31. § 5 "That whoever ſhall buy or receive any *goods or chattels* tha ſhall be feloniouſly taken or ſtolen from any other perſon knowing the ſame to be ſtolen, ſhall be taken and deeme an acceſſary to ſuch felony after the fact, and ſhall incur th ſame puniſhment as an acceſſary to the felony after the fe lony committed." The queſtion therefore is, Whethe *Bank Notes* can be conſidered as *Goods and Chattels* within th meaning of theſe ſtatutes? Bank Notes were not, at com mon law, the ſubject of larceny; for although that offenc is defined to be the felonious taking and carrying away th goods and chattels of another, yet it has always been con fined to the mere perſonal goods and chattels of another which do not extend to every ſpecies of perſonal propert of which a man may become poſſeſſed. The words *bona e catalla* do not, of their proper nature, extend to charters, o to any evidences concerning the freehold or inheritance, o to obligations, or to deeds, or to other ſpecialties; an therefore it is ſaid by Lord Dyer, that an action of trove will not lie for a bond, nor can the value of it be demande by the name of goods or chattels. Among this ſpecies o property, which were not the ſubjects of larceny, becaus they were not comprehended within the legal idea of good and chattels, were Bank Notes, and every other deſcriptio

of property which is within the denomination of a *choſe in action*. But it is enacted by the ſtatute 2 *Geo.* II. cap. 25, § 3: "That if any perſon, or perſons ſhall ſteal or take by robbery any Exchequer Orders, Exchequer Bills, *Bank Notes*, Bonds, Bills of Exchange, &c. notwithſtanding any of the ſaid particulars, are termed in law a *choſe in action*, he ſhall be deemed guilty of felony, of the ſame nature, and in the ſame degree, as it would have been if the offender had ſtolen any *other goods* of the like value with the money due on ſuch orders, bills, bonds, notes, &c. or ſecured thereby." This ſtatute undoubtedly makes Bank Notes ſo far goods and chattels, as to make them the ſubject of larceny, but no further; it does not ſay that the receivers of ſtolen Bank Notes ſhall be conſidered as acceſſaries after the fact, or that Bank Notes ſhall be conſidered as goods and chattels, to all intents and purpoſes whatſoever. As to the proviſion, that ſuch perſons who ſhall ſteal them ſhall be puniſhed "in the ſame manner as if they had ſtolen *other goods* of the like value," the word "*goods*," in this part of the Act, is not uſed in the ſtrict, legal, and technical ſenſe of the term, but is only put as an inſtance, and uſed in the general and colloquial acceptation of the word, as ſynonymous to "*property*" in general. If any doubt could be entertained on this ſubject, the opinion of LORD MANSFIELD, in the caſe of *Miller* v. *Race*, long ſubſequent to the paſſing of the Act, would certainly remove it; for his Lordſhip expreſsly declares, that Bank Notes do not reſemble, and therefore ought not to be compared, to *goods*, ſecurities, documents, and other chattels; but are to be treated as money, or caſh; and it has been uniformly held, that money cannot be included within the meaning of the words "goods and chattels." In Davidſon's caſe, at Carliſle aſſizes, 1766, a man was indicted for receiving money, knowing it to have been ſtolen; and Mr. Juſtice *Bathurſt* was clearly of opinion, that money was not within the ſtatutes 3 *Will.* and *Mary*, cap. 9, or 5 *Anne*, cap. 31. In the caſe of *Woolcomb* v. *Woolcomb*, it was held by Lord Chancellor KING, that the ready money and bonds of a teſtator do not paſs by the word "*goods*." Mr. Juſtice *Foſter* alſo ſays, that *money* is not within the 10 and 11 *Will.* III. cap. 23, which makes it a capital offence to ſteal any *goods*, *wares*, and *merchandizes*, to the value of five ſhillings, from a ſhop or warehouſe. But even admitting that Bank Notes were now taken to be goods and chattels by virtue of the 2 *Geo.* III. cap. 25, to all intents and purpoſes whatſoever, yet it would be impoſſible to include the receivers of them under the 3 Will. and Mary, cap.



cap. 9, and 5 *Anne*, cap. 31, becauſe "*Bank Notes*" could not be at that time in the contemplation of the Legiſlature as goods and chattels. All bonds, bills, notes, and other ſecurities were then *choſes in action*, and could not be included, by any conſtruction, within the meaning of the words "*goods and chattels*; for thoſe words can only refer to the receipt of ſuch things as were goods and chattels at the time the Acts were paſſed. The ſtatute of the 31 *Eliz.* cap. 12, takes away clergy from acceſſaries after the fact in horſe-ſtealing; but it has been held that the ſtatute only extends to ſuch offenders as were acceſſaries at the time the Act was made, *viz.* acceſſaries at the common law, and therefore a man knowingly receiving a ſtolen horſe, if he did not alſo receive the felon, was not within the Act. It is true, that ſuch an offender may now be puniſhed as a receiver of ſtolen goods under the 5 *Anne*, cap. 31.

After the argument was cloſed, the auditors were ordered to withdraw, and the JUDGES conferred among themſelves upon the ſubject.

Mr Baron PERRYN, in January Seſſion, 1788, after ſtating the particulars of the caſe, delivered the reſult of their conference to the following effect: This caſe was reſerved in July Seſſion laſt by Mr. *Roſe*, and referred to the conſideration of the Judges, on two grounds. Firſt, On a variance between the count againſt the principal, wherein the notes are charged to be the *property* of Stephen Sullivan, and the count againſt the acceſſary, wherein they are charged to be the *property and chattels* of Stephen Sullivan. Secondly, That the receiving the Bank Notes is not within any Act of Parliament which makes receivers acceſſaries after the fact. On the firſt day of laſt Michaelmas Term, the JUDGES, on a conference had by them, directed Counſel to be heard on theſe objections; and on the 14th of November the caſe was argued before TEN JUDGES with great ability, and very much at large, by Mr. *Knowlys*. The JUDGES have ſince conſidered of thoſe arguments; and, with reſpect to the firſt objection, they are unanimouſly of opinion, that the word "*chattels*," in the count againſt the acceſſary, may be rejected as ſurpluſage. The ſubject of the ſecond objection has occaſioned a difference of ſentiment among the JUDGES; but a majority of them are of opinion, in which opinion I concur, that *Cayle's Caſe*, 8 *Co.* 33, *Channel* v. *Ramſbottom*, *Yelv.* 68, and particularly *Miller* v. *Race*, 1 *Bur.* 457, are in point; and that "*Bank Notes*" are not "*goods and chattels*" within the meaning of the ſtatutes of the 3 *Will.* and *Mary*, *cap. 9*, and 5 *Anne*, cap. 31, and the judgment againſt

William Morris, the priſoner at the bar, muſt be conſequently be arreſted.

The priſoner was accordingly diſcharged.

BALLIE'S CASE.

This was a caſe reſerved, at the Old-Bailey, September, 1785, by Mr. SERJEANT ADAIR, *Recorder*, for the opinion of the TWELVE JUDGES.

The priſoner had been apprehended on the ſtatute 23 *Geo.* III. cap. 88, by which it is enacted, "That if any perſon ſhall be found in or upon any dwelling-houſe, warehouſe, coach-houſe, ſtable, or out-houſe; or in any incloſed yard, or garden, or area, belonging to any houſe, with intent to ſteal any goods or chattels, he ſhall be deemed A ROGUE AND A VAGABOND, within the meaning of the ſtatute of 17 *Geo.* II. cap. 5, uſually called *the Vagrant Act*;" and having been committed to the Houſe of Correction till the then next enſuing Seſſion, the Juſtices, on examination of the circumſtances, had adjudged him to be A ROGUE AND A VAGABOND within the meaning of the Act; and ordered him to be detained in the Houſe of Correction for ſix months, by virtue of 17 *Geo.* II. cap. 5. § 9. Before the ſix months had expired, the priſoner made his eſcape; but he was again apprehended, and at an adjournment-day of the ſame Seſſion, he was committed by a warrant of two Juſtices, under the 4th ſection of the Vagrant Act, as an INCORRIGIBLE ROGUE, and ordered to be detained in the ſame Houſe of Correction for two years. Before this term of impriſonment had expired, he again broke gaol, and was again apprehended, on another clauſe of the ſtatute 23 *Geo.* III. cap. 28, by which it is enacted, "That any perſon having upon him any picklock key, crow, jack, bit, or other implement, with an intent feloniouſly to break and enter into any dwelling houſe, warehouſe, coach-houſe, ſtable, or out-houſe; or ſhall have upon him any piſtol, hanger, cutlaſs, bludgeon, or other offenſive weapon, with intent feloniouſly to aſſault any perſon, ſhall be deemed A ROGUE AND VAGABOND, as aforeſaid."

Under theſe circumſtances, the priſoner was now indicted on the ſtatute 17 *Geo.* II. cap. 5, § 9, by which it is enacted, that if any perſon committed as an INCORRIGIBLE ROGUE ſhall break out or make his eſcape, or ſhall offend again in

like manner, he ſhall be guilty of FELONY, and be tranſported for ſeven years.

The indictment accordingly *ſtated*, that the priſoner had been committed by a Juſtice, and convicted by the Seſſions, as A ROGUE AND VAGABOND under the 23 *Geo.* III. cap. 88, and having been committed for ſix months, had eſcaped, &c. That afterwards he had been convicted for that eſcape, and committed as AN INCORRIGIBLE ROGUE, and again broke gaol before the expiration of the time, &c. And then it charged, that the ſaid George Bullie, on ſuch a day, did offend again *in like manner* as A ROGUE AND VAGABOND, in having upon him a certain offenſive weapon called a piſtol, with intent feloniouſly to aſſault ſome perſon or perſons, againſt the peace, &c.

The records of his former convictions were produced, his identity, and the fact of his having the piſtol for felonious purpoſes, was fully proved, and he was found guilty; but the judgment was reſpited, and the caſe referred to the conſideration of the JUDGES, on the two following queſtions.

Firſt, Whether the offence for which the priſoner was convicted, being created by the ſtatute 23 *Geo.* III. cap. 88, could be maintained under an indictment on the ſtatute of 17 *Geo.* II. cap. 5.

Secondly, Whether the words "ſhall offend again *in like manner*," in the ſtatute of 17 *Geo.* II. cap. 5, do not refer to ſuch offences only as bring the offender under the deſcription of AN INCORRIGIBLE ROGUE? and if ſo, Whether the preſent indictment is good in charging the priſoner with having offended *in like manner* as A ROGUE AND VAGABOND, inſtead of having offended *in like manner* as AN INCORRIGIBLE ROGUE?

Mr. Juſtice GOULD, in February Seſſion, 1786, after ſtating the proceedings above-mentioned, delivered the opinion of the JUDGES to the following effect:

This caſe was reſerved by Mr. RECORDER, upon two objections raiſed by the Counſel for the priſoner. On the firſt day of laſt Hilary Term, the JUDGES aſſembled to conſider of this caſe; and they are unanimouſly of opinion, That there is no foundation in law for either of the objections.

As to the firſt objection, The title of an Act of Parliament, although it is not conſidered as any part of the Act, yet it may ſerve to explain the intent and meaning of the Legiſlature; and the title of the 23 *Geo.* III. cap. 88, is

"An

"An Act to extend the provisions of an Act [ſetting out the title of the 17 *Geo.* II. cap. 5,] to caſes not therein mentioned." It enacts, that every perſon under the circumſtances in which the priſoner is deſcribed in the indictment to have been found, ſhall be deemed a rogue and vagabond within the meaning of the 17 *Geo.* II. cap. 5. The JUDGES are therefore of opinion, That the 23 *Geo.* III. cap. 88, is to have the ſame operation as if the offences deſcribed in it had been originally inſerted in the Vagrant Act, in continuation of the offences therein deſcribed; and that it is in every reſpect to be conſidered as incorporate into, and making a part of, that Act.

As to the ſecond objection,—The JUDGES, upon weighing the ſeveral proviſions of the 17 *Geo.* II. cap. 5, as far as they apply to the caſe of the priſoner, are of opinion, That the indictment is right both in form and ſubſtance. The ſtatute divides offences into three claſſes. *Firſt*, IDLE AND DISORDERLY PERSONS, who on conviction by one witneſs, before one Juſtice, may be committed to the Houſe of Correction, not exceeding one month. *Secondly*, ROGUES AND VAGABONDS, who are to be examined by the Magiſtrate, and publickly whipped, or ordered to be ſent to the Houſe of Correction till the next Seſſion, or for any leſs time, as ſuch Juſtice ſhall think proper. *Thirdly*, INCORRIGIBLE ROGUES, who it ſeems muſt be committed till the next Seſſion, and cannot be puniſhed by the Magiſtrate.

It appears that the priſoner eſcaped from his commitment as a rogue and vagabond, upon which eſcape he immediately became an incorrigible rogue; and on being brought before the Seſſion, he was ſo adjudged, and ſentenced to be detained in the Houſe of Correction for two years, and afterwards made his eſcape. Theſe facts are introduced into the indictment; and it then goes on to ſtate the offence which he had committed againſt the ſtatute 23 *Geo.* III. cap. 88; and concludes by averring, in the words of the 17 *Geo.* II. cap. 5, that he had "offended again *in like manner*."

The ſtatute of 23 *Geo.* III. cap. 88, declares, that the perſons therein deſcribed ſhall be conſidered as rogues and vagabonds, within the meaning of the 17 *Geo.* II. cap. 5. It is enacted by the 17 *Geo.* II. cap. 5. § 4, "That all *rogues and vagabonds* who ſhall break or eſcape out of any Houſe of Correction before the expiration of the term for which they were committed; and all perſons who, after having been puniſhed as *rogues and vagabonds*, and diſcharged, ſhall again commit *any of the ſaid offences*, ſhall be deemed incorrigible

rigible rogues." The Act then goes on, in § 9, to authoriſe the Juſtices in Seſſion to detain ſuch *rogue and vagabond* in the Houſe of Correction for any time not exceeding ſix months; and ſuch *incorrigible rogue* for any time not leſs than ſix months, nor exceeding two years; and then follows the clauſe on which the preſent queſtion ariſes: "And if ſuch *incorrigible rogue*, ſo ordered by the Seſſions to be detained in the Houſe of Correction, ſhall break out or make his eſcape, *or* ſhall offend again in like manner, he ſhall be guilty of felony, and be tranſported for ſeven years." The context of this clauſe of the Act, which adopts the words, "*in like manner*," refers to the next antecedent words, "*ſhall break out or make his eſcape*;" recourſe therefore muſt be had to the other parts of the Act, to find out what the Legiſlature by theſe words means: and the JUDGES are of opinion, That the words "*in like manner*" muſt neceſſarily refer to the offences deſcribed in the fourth ſection beforementioned.

What then is the ſituation of the priſoner? He is committed to the Houſe of Correction for ſix months as a *rogue and vagabond:* by breaking gaol he is guilty of a new act of vagrancy, and is adjudged and committed for two years as an *incorrigible rogue:* from this impriſonment he again makes his eſcape before the two years are expired; and commits another act of vagrancy as *a rogue and vagabond*, againſt the 23 *Geo.* III. cap. 88. By this eſcape he becomes *an incorrigible rogue* a ſecond time; and he afterwards offends again "*in like manner*" as a rogue and vagabond. All theſe facts are diſcloſed in the indictment. No technical terms or words of art are made neceſſary to the deſcription of this offence. The law therefore muſt draw the inference from the words, *viz.* that by having offended again in like manner as a *rogue and vagabond*, he becomes *an incorrigible rogue* a ſecond time, and thereby incurs the guilt of felony; and it is therefore the unanimous opinion of the JUDGES, That the indictment is proper; and that the priſoner is in the predicament which the Legiſlature has ſaid ſhall be puniſhed with tranſportation.

He was accordingly ordered to be tranſported for the term of ſeven years.

LOCKHART'S CASE.

Old Bailey, June Seſſion, 1785. The priſoner was indicted for ſtealing a number of diamonds and pearls, the property of Ewen Baily, Eſq. in the dwelling-houſe of Narciſſa Maſcall.

He had made a full confeſſion of the fact, by which it was diſcovered that part of the property had been diſpoſed of to a Mr. Grant, and the Counſel for the proſecution called Mr. Grant as a witneſs to identify the property.

The confeſſion had been obtained by ſuch promiſes of favour as rendered it admiſſible evidence; and it was therefore contended, that as the diſcovery of Mr. Grant reſulted from the illegal confeſſion which had been obtained from the priſoner, he, Mr. Grant, was not competent witneſs.

But the COURT ſaid, that the law was clearly ſettled, that although a confeſſion improperly obtained cannot be given in evidence, yet it can never go the rejection of the evidence of other witneſſes, which are got at in conſequence of ſuch a confeſſion.

AICKLES'S CASE.

Old Bailey, September Seſſion, 1785.

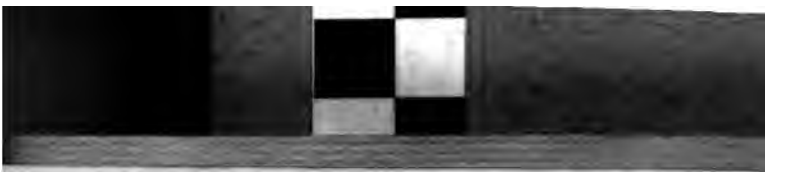
John Henry Aickles had been convicted in January Seſſion, 1784, of ſimple grand larceny; and in the July Seſſion following, received judgment of tranſportation *to America* for ſeven years: but, in conſequence of ſtrong interceſſion in his favour, he afterwards received his Majeſty's pardon, "on condition of tranſporting himſelf *beyond the ſeas* for the ſame term of years, within fourteen days from the day of his *diſcharge*, and of giving ſecurity to the ſatisfaction of the RECORDER ſo to do." He gave the ſecurity required, and a warrant was accordingly iſſued by the RECORDER, directed to the Keeper of Newgate, authoriſing his diſcharge; but as there was a number of civil detainers againſt him, his diſcharge was neceſſarily delayed until they were ſuperſeded. On the 26th of May following, he was apprehended at Iſlington; and was now put to the bar on AN INDICTMENT for "re-

" returning from tranſportation, and being found at large without *any lawful cauſe*, before the expiration of the term of ſeven years, for which he was ſentenced to be tranſported."

Under theſe circumſtances, it was held incumbent on the proſecutor to prove the preciſe day on which the priſoner was *diſcharged*; and for this purpoſe Mr. Newman, Clerk of the Papers of the priſon, produced a daily book, which he kept, containing entries of the names of all the debtors and criminals who are brought into the priſon, and the times when they are diſcharged; but it appeared that thoſe entries were not made from Mr. Newman's own knowledge of the facts, but that he generally made them from the information of the turnkeys and frequently from the turnkey's indorſements on the back of the warrants, which warrants were afterwards regularly filed.

It was contended by the priſoner's Counſel, that theſe were not original entries of the facts, and therefore that the turnkey himſelf, by whom Aickles was diſcharged, or the original minute from which the entry of his diſcharge had been made, ſhould be produced, becauſe they alone were the beſt evidence upon this ſubject, and it was in the proſecutor's power to produce them. It was compared to the production of a tradeſman's ledger, in order to prove the delivery of goods, inſtead of producing the original memorandum or day-book from which the ledger had been poſted; and it was argued, that no credit could be given to entries made intirely from hearſay and information, and therefore they ought not to be received as evidence.

The COURT, however, were clearly of opinion, That the contents of this book might be given in evidence. It is a book very different in its nature from the books or memorandums of a tradeſman. It appears to have been the conſtant aud well eſtabliſhed practice of the keepers of a publick priſon to regiſter the diſcharge of priſoners in ſuch a book as the one produced, and in the manner which the witneſs has deſcribed. The clerk of the Papers is a public officer in the priſon; and the law repoſes ſuch a confidence in public officers, that it *preſumes* they will diſcharge their ſeveral truſts with accuracy and fidelity; and therefore whatever acts they do in diſcharge of their publick duty, may be given in evidence, and ſhall be taken to be *true*, under ſuch a degree of caution as the nature and circumſtances of each caſe may appear to require, except the *falſity* of them can be made to appear; for every preſumption may be repelled by contrary evidence. In the preſent caſe, Mr. Newman,



has no private intereſt whatſoever in this book, to induce him to make factitious entries in it. He is a public officer, recording a public tranſaction. Any perſon may undoubtedly falſify the entries if he can; but unleſs the truth of the entry as to the preſent fact can be impeached, it is admiſſible evidence.

The entry was accordingly read; and it proved that the priſoner was diſcharged from Newgate, by virtue of Mr. RECORDER'S warrant for that purpoſe, on the 14th of March, 1785.

The fact of the priſoner's having been found at large before the term of his tranſportation had expired, being clearly proved, the queſtion was, Whether he was at large *without lawful cauſe?* And it was ſubmitted to the Court upon the authority of *the King* v. *Max. Miller*, and *Patrick Madan's Caſe*, that having *literally* complied with the condition of the King's pardon, by giving ſecurity to the ſatisfaction of THE RECORDER to tranſport himſelf beyond the ſeas, and having in conſequence thereof been legally diſcharged from Newgate by virtue of THE RECORDER'S warrant, that diſcharge was *a lawful cauſe* for his being at large, notwithſtanding he had forfeited the recognizance of himſelf and his bail, by breaking the other part of the condition, in not tranſporting himſelf within *the fourteen days.*

The COURT appeared to differ in their opinion upon this point; and it was thought a proper queſtion for the conſideration of THE JUDGES, in caſe the Jury ſhould find the priſoner guilty. On further evidence, however, it appeared that he had at the time of his diſcharge a real determination to quit the kingdom within the time, but that he had been prevented from carrying it into effect by unaffected poverty, diſtreſs, and ill-health; and the Court being of opinion, That theſe impediments, if true, amounted to a *lawful excuſe*, the Jury found a verdict, NOT GUILTY.

The KING *againſt* AICKLES.

At the Old Bailey in February Seſſion, 1787, John Henry Aickles was indicted before Mr. Juſtice *Groſe*, for forging a certain promiſſory note for the payment of money, with intent to defraud Robert Harvey Gedge.

There was alſo a ſecond count, for uttering it knowing it to be forged, with the like intention. The form of the note was as follows:

" £.25

"£.25 10s 0d. London, Dec. 18, 1786.

"Three months after date, I promiſe to pay to Henry Byron, Eſq. or order, twenty-five pounds ten ſhillings, for value received.

"*No 4, Argyle-Street, Oxford road.* "JOHN MASON."

Henry Byron, the payee of the note, went to the ſhop of Mr. Gedge, a linen-draper in Leiceſter-fields, and having looked out ſeveral pieces of goods to the amount of twenty guineas, he preſented the note above deſcribed, in payment. Mr. Gedge aſked Byron, who John Maſon, the drawer of it, was. Byron anſwered, "He is a gentleman of conſiderable fortune, with whom I am concerned in the profits of a coal-mine; and he lives at N° 4, Argyle-ſtreet, Oxford road." Mr. Gedge, however, refuſed to take the note until he had enquired into its validity; and Byron very readily left the note with him, *unindorſed*, for that purpoſe, deſiring that he would not ſend the goods until he was perfectly ſatisfied. Mr. Gedge accordingly ſent his ſervant to N° 4, Argyle ſtreet, where he was introduced to the priſoner as Mr. Maſon. The priſoner, on being ſhewn the note, ſaid that the name *John Maſon* was his hand-writing, and that it would be punctually paid when due; but before Mr. Gedge had parted either with the note or with the goods, Mr. Byron was apprehended for defrauding a hoſier, and Mr. Aickles for having returned from tranſportation before his time. The priſoner had taken the houſe in Argyle-ſtreet, about a month before he was apprehended in the name of *John Maſon*; and had ſigned a written agreement in *that name* with his landlord, who had enquired his character in *that name* at a coffee-houſe in Round-court in the Strand. He was alſo known by the name of *John Maſon* where he had before lodged; and he alleged in his defence, that *John Maſon* was his *real name*, but that he had been known for three years by the fictitious name of *John Henry Aickles*; and he had re-aſſumed his *real name* for the purpoſe of avoiding the detection to which the longer uſe of his *fictitious name* would unavoidably have expoſed him.

It was contended by a gentleman at the bar, in behalf of the priſoner, that theſe facts did not amount to the crime of forgery, for that the law required the act, to be done in the name of *another* perſon.

The Jury found the priſoner guilty; and they added, that they believed the name of *Maſon* was aſſumed for the purpoſe of negotiating the note in confederacy with *Henry Byron*, but that the name he was beſt known by was *John Henry Aickles*.

The judgment, however, was reſpited, and the caſe referred to the conſideration of the TWELVE JUDGES.

Mr. Juſtice ASHHURST, in May Seſſion, 1788, ſaid, "The JUDGES have been conſulted upon the law of this caſe; and they are of opinion, That *under the particular circumſtances which occurred in evidence*, the indictment is not maintainable, and therefore the judgment muſt be ſtaid."

The priſoner, having been tried in the former part of the Seſſion for returning from tranſportation, and acquitted, was remanded under his original ſentence.

MAJOR SEMPLE'S CASE.

At the Old Bailey, in July Seſſion, 1786, J. G. Semple was put to the bar, to be arraigned on an indictment of larceny.

The indictment ſtated, "That James George Harrold, otherwiſe Semple, otherwiſe Kennedy, *labourer*, one chaiſe, called a poſt-chaiſe, of the value of fifty pounds, the goods and chattels of John Lycett, feloniouſly did ſteal, take, and carry away, &c."

Before the priſoner had pleaded, it was moved to quaſh the indictment on the ground of informality; the *addition* being placed after the *alias dictus*, and not after the firſt name.

The COURT, upon the authority of *Staundford*, *Hale*, and *Hawkins' Pleas of the Crown*, directed the indictment to be quaſhed, and the priſoner to be detained till the next Seſſion.

At the enſuing Seſſion the priſoner was again indicted for the ſame offence, before Mr. Serjeant ADAIR, *Recorder*, preſent Mr. Juſtice *Gould*, and Mr. *Roſe*, *D. R.*

The following facts appeared in evidence: —The proſecutor, Mr. Lycett, was a coachmaker, who let out carriages to hire. The priſoner was a gentleman who lodged in the neighbourhood, and had frequently hired chaiſes from the proſecutor, as the occaſion required, and for which he had always paid with great punctuality. On the firſt of September, 1785, the priſoner hired a poſt-chaiſe of the proſecutor, ſay-



ſaying that he ſhould want it for three weeks or a month, as he was going a tour round the North. It was agreed that the priſoner ſhould pay at the rate of five ſhillings a day during the time that he kept the chaiſe; and a price of fifty guineas was talked about in caſe he ſhould determine to purchaſe the chaiſe on his return to London, but no poſitive agreement took place between them on the ſubject of the purchaſe. In a few days afterwards the priſoner fetched the chaiſe from Mr. Lycett's with his own horſes; and it was in evidence, that he was driven in it from London to the Crown and Cuſhion at Uxbridge, where he ordered a pair of horſes, and went from thence to the Duke of Portland's, and returned. He took freſh horſes at the Crown and Cuſhion, but where he went with the chaiſe afterwards, did not appear. The fact was he never returned it to Mr. Lycett; nor could any tidings be obtained of him till twelve months afterwards, when he was accidentally apprehended by the activity of Mr. Feltham, in Fleet-ſtreet, upon a ſuſpicion of having, under falſe pretences, defrauded him of a quantity of ladies hats.

The Counſel for the priſoner ſubmitted to the Court, that admitting the whole of the evidence to be true, the offence did not amount to felony; and they endeavoured to diſtinguiſh it from *the King* v. *Pures*, and *Aickles' Caſe*, inaſmuch as in thoſe caſes the parties had never obtained the legal poſſeſſion of the property delivered to them; but that in the preſent caſe the priſoner had obtained the chaiſe upon a contract, which it was not proved that he had broken; for the chaiſe was not hired for any definite length of time, or to go to any certain place; and the mere underſtanding that it was for three weeks or a month, for the purpoſe of making a tour round the North, made no part of the contract. He had hired it for ſuch a length of time as he ſhould pleaſe to keep it, at a certain ſtipulated price for each day; and it being delivered to him upon theſe terms, he had the entire poſſeſſion of it in himſelf, and was anſwerable in damages for its detention, or for any injury which might happen to it during his abſence. But ſuppoſing the contract ſhould be thought not to extend beyond the three weeks or a month, it is clear that during that time he had at leaſt the legal poſſeſſion; and then no intention to convert it wrongfully to his own uſe ariſing afterward, whether from neceſſity or diſhoneſty, will make the withholding it felony; for the *animus furandi* muſt exiſt at the time the property is firſt obtained. In all the leading caſes upon this ſubject of *conſtructive* felony, there has always been ſome evidence of

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tortious *converſion*; but in this caſe it has not been proved that the priſoner has diſpoſed of the chaiſe: it may be at this very moment in his poſſeſſion, for any thing that appears to the contrary, and a converſion cannot be inferred from his having neglected to return it.

THE COURT—The Court is bound by the determination of former caſes. It is now ſettled that the queſtion of intention is for the conſideration of the Jury; and in the preſent caſe if they ſhould be of opinion that the original hiring of the chaiſe was felonious, it will fall precifely within the principle of *Pares' Caſe*, and the other deciſions which the JUDGES have made upon the ſubject of conſtructive felony. If there was a *bonâ fide* hiring of the chaiſe, to pay ſo much for every day for the uſe of it, and a real intention of returning it, a ſubſequent converſion of it cannot be felony, whether the time for which it was hired be limited or indefinite; for by the *bonâ fide* contract, and ſubſequent delivery, the priſoner would have acquired the lawful poſſeſſion of it; and therefore, although he afterwards abuſed that truſt and that poſſeſſion, felony could not enſue, becauſe the original taking was lawful. But, on the other hand, if the hiring was only a pretence made uſe of to get the chaiſe out of the poſſeſſion of the owner, without any intention to reſtore it, or to pay for it; in that caſe, the law ſuppoſes the poſſeſſion ſtill to reſide with the owner, though the property itſelf is gone out of his hands, and then the ſubſequent converſion will be felony. The caſe of *the King* v. *Pares*, was very ſolemnly debated at L.d. Ch. Juſtice *De Grey's* houſe; and the unanimous opinion of the JUDGES was at laſt, That the direction given to the Jury by the learned Judge who tried the priſoner was right. The moſt important part of the argument turned upon the conſideration, Whether the delivery of the horſe to *Pares* had in law diveſted the owner either of his property or the poſſeſſion of it? The queſtion left with the Jury was, Whether the contract was meant fairly? or, Whether it was a mere colour and pretence? The Jury found, that it was a mere colour and pretence; and upon that finding, the JUDGES determined the taking to be felony; becauſe it is an eſtabliſhed principle of law, that the poſſeſſion of property cannot be obtained through the medium of a fraud. But it has been attempted to diſtinguiſh the preſent caſe from *the King* v. *Pares*.——FIRST That the hiring in this caſe was indefinite, but that in *the King* v. *Pares*, it was certain and limited. The time cannot be material in queſtions of this nature. *Pares* hired the horſe in the morning, under pretence of going to Sutton in Surrey,

Surrey, and to return in the evening; but as the hiring was found to be felonious, the law of the caſe muſt have been the ſame, although it had appeared that the hiring was for two days, a week, a month, or any other given time; nay, if the time had been left entirely unlimited. The circumſtance of the time being long or unſettled, may indeed render the proof of guilt more difficult, but cannot alter the law of the caſe.—SECONDLY, It is ſaid, that this caſe differs from *the King* v. *Pares*, becauſe it was proved that *Pares* had ſold the horſe, and therefore had converted it to his own uſe; but that in the preſent caſe no proof has been given that the priſoner has ſold or otherwiſe converted the chaiſe. Proof of actual converſion certainly is not neceſſary, but the Jury muſt judge of it from the circumſtances of the caſe. If the priſoner, at any time before the proſecution was commenced, had offered to reſtore the chaiſe to the owner, or to pay him for it, ſuch a conduct would have been evidence of an honeſt intention when he originally hired it, and would have reprobated the idea of a fraudulent deſign. But he hires the chaiſe for a month, and a year paſſes, and neither the chaiſe nor the man are heard of till he is taken. There is no evidence even at this moment that the chaiſe is forthcoming, nor does any one pretend to know where it is. This therefore raiſes a preſumption againſt the priſoner, which it is incumbent on him to repel; and if he cannot, it will be for the conſideration of the Jury, under all the circumſtances of the caſe, whether they think he has *feloniouſly* diſpoſed of it, or otherwiſe converted it to his own uſe. In their determination of this point, they muſt recur to the time of the original hiring, and to the nature and meaning of the contract then made between the parties. If they think the *re-delivery* of the chaiſe formed any part of the contract, the *non-delivery* of it muſt neceſſarily form a part of their conſideration. They will then conſider whether the *non-delivery* is ſufficient evidence to ſatisfy their conſciences that he has converted it to his own uſe. Theſe two conſiderations will naturally lead to a third, *viz.* Whether the property thus converted was originally obtained with a felonious deſign? which will carry them back to the inſtant of time that he obtained poſſeſſion of it; and if they ſhould find the original hiring was felonious, the moſt ingenious ſubtlety cannot diſtinguiſh this caſe from that of *the King* v. *Pares*. There is a caſe in *Kelynge* of a perſon who took a lodging in a houſe, and afterwards at night, while the people were at prayers, robbed them. The Jury found that the intention of taking the lodging was

to commit the felony; and the JUDGES determined that this was *burglary*. There was alſo a caſe determined very lately by the JUDGES, A man ordered a pair of candleſticks from a ſilverſmith to be ſent to his lodgings. They were ſent to his lodgings with a bill of parcels; but he contrived to ſend the ſervant back, and to keep the goods; and this was held to be felony, although they were delivered, with the bill of parcels, under an expectation of being paid the money: for the Jury found it a pretence to purchaſe, with intention to ſteal.

The queſtion of original intention was left with the Jury; and they found the priſoner *Guilty*. A motion was made in arreſt of judgment; but he received ſentence of tranſportation for ſeven years.

TRAPSHAW'S CASE.

At the Old Bailey in Auguſt Seſſion, 1786, William Trapſhaw was convicted of breaking and entering the dwelling-houſe of James Linnel, in the day-time, Frances his wife being therein, and ſtealing ſeveral articles of wearing apparel, value 7s. and 4d. the property of the ſaid James Linnel: but the judgment was reſpited, and a queſtion ſubmitted to the conſideration of the TWELVE JUDGES, Whether, under the following circumſtances, the room broke open by the priſoner was laid in the indictment to be the dwelling-houſe of James Linnel?

The houſe was ſituated in the Temple-Mews, and belonged to the Earl of Radnor, who let *the whole* of it out in lodgings. It was inhabited by three families, and had only one outer door, which was common to all the inmates. James Linnel rented the ground-floor, and a ſingle room up one pair of ſtairs. It was the parlour-door on the ground-floor that was broke open, and the things mentioned in the indictment were taken from that room.

The JUDGES aſſembled at Lord *Loughborough's* Chambers on the firſt day of Hilary Term, to conſider this caſe; and at the Old Bailey, in the February Seſſion following, Mr. Juſtice *Gould* publicly declared their opinion.

Mr. JUSTICE GOULD—The indictment upon which this queſtion ariſes, is founded on the ſecond part of that clauſe of the ſtatute 3 and 4 *Will.* and *Mary*, cap. 9, § 1, which enacts, "That all and every perſon or perſons that ſhall



at any time *rob* any other perſon, or ſhall feloniouſly take away any goods or chattels being in any dwelling-houſe, the owner or any other perſon being therein, and put in fear; OR *ſhall rob any dwelling-houſe in the day-time, any perſon being therein*; OR ſhall comfort, aid, abet, aſſiſt, counſel, hire, or command any perſon or perſons to commit any of the ſaid offences; OR to break any dwelling-houſe, ſhop, or warehouſe thereunto belonging, or therewith uſed in the day-time, *and feloniouſly take away any money, goods, or chattels of the value of five ſhillings* or upwards, therein being, although no perſon ſhall be within ſuch dwelling-houſe, ſhop, or warehouſe; OR ſhall counſel, hire, or command any perſon to commit any burglary, ſhall not have the benefit of his or their clergy." The word *rob*, in a legal conſtruction, always includes the idea of *force and violence*; and although this part of the ſtatute does not expreſsly ſignify that *breaking and entering* the houſe is neceſſary to conſtitute the crime, yet it has always been held upon this ſtatute, as well as upon other Acts of Parliament penned in the ſame manner, that thoſe ingredients are *ex vi termini* included in, and implied by, the word ROB. It is therefore eſſential to conſider what degree of breaking and entering is neceſſary; and it is ſettled in a variety of determinations upon the ſtatutes relating to this ſubject, that the breaking muſt be of a *dwelling-houſe*, in the ſame way as would be neceſſary to conſtitute the crime of burglary upon the rules of the common law; the only difference between the two offences being, that burglary muſt be committed in a dwelling-houſe in the night-time, and this offence muſt be committed in a dwelling-houſe by day. The next conſideration therefore is, what ſhall be conſidered as a dwelling-houſe within the meaning of this Act of Parliament. In Mich. Term, 1773, a caſe on a conviction of burglary was determined by the JUDGES, the circumſtances of which were analogous to the preſent caſe. The owner of the houſe had let *the whole* of it to different lodgers. The proſecutor rented a room on the firſt floor, a ſhop and a parlour on the ground-floor, and a cellar underneath the ſhop, at 12l. 10s. a year. The owner took back the cellar to keep lumber in, for which he allowed the proſecutor a rebate out of his rent of 10s. a year. The entrance was into a paſſage by a door from the ſtreet, and on the ſide of the paſſage one door opened into the ſhop, and another into the parlour; and beyond the parlour was the ſtair-caſe, which led to the upper apartments. The ſhop and parlour doors were broke open; and the JUDGES determined that theſe rooms were properly laid to be

the dwelling-houſe of the proſecutor; for it could not be called the manſion of the owner, as he did not inhabit any part of it, but only rented the cellar for the purpoſes before mentioned. And the number of houſes, eſpecially in the metropolis, which are in a ſimilar ſituation, muſt have been left entirely unprotected againſt burglary, had it been determined that the apartments of lodgers were not their dwelling-houſes, when the owner has, as it were, abandoned the dwelling himſelf, and left the whole houſe to their enjoyment and poſſeſſion. In February Seſſion, 1781, the caſe of *the King* v. *Carrol* for burglary, was reſerved by Mr. *Recorder*. The houſe belonged to one Naſh, who had let *the whole* of it in ſeparate tenements. The proſecutor, as tenant at will to Naſh, rented a ſleeping-room up one pair of ſtairs, and a work-ſhop in the garret. The door of this work-ſhop was broke open; and the queſtion was, Whether it could be conſidered as the manſion of the proſecutor? According to my note of this caſe, the JUDGES were unanimouſly of opinion in the affirmative; and they relied upon *the King* v. *Rogers* as a caſe in point. I have indeed ſeen a memorandum of the ſame caſe by Mr. Juſtice *Buller*, in which he takes notice, that only TEN of the TWELVE JUDGES were of this opinion; and from the known accuracy of that learned Judge, I muſt preſume the fact was as he ſtated it: but I have no recollection that either *he* or Mr. Baron *Eyre* diſſented at the time from the opinion of the other JUDGES. In the preſent caſe, however, all the JUDGES are of opinion, That the two determinations which I have recited are preciſely in point; and that the preſent indictment properly charges the room broke open, to be the dwelling-houſe of James Linnel. The reaſon of this opinion becomes evident the moment it is ſtated. The owner of the houſe is, if I may ſo expreſs myſelf, THE LORD of it; but having relinquiſhed every part of it to the habitation of others, it cannot with any propriety be conſidered as *his* manſion or dwelling-houſe. The entierity which reſides with him is ſplit into ſeveral poſſeſſions; and every ſeparate apartment, being in a diſtinct and ſeveral occupation, is the diſtinct manſion-houſe of its reſpective poſſeſſor.

The priſoner accordingly received ſentence of death.

... prisoner was a hackney-coach
from his ſtand to convey the proſecutc
tel in the Adelphi, to N° 9, Orch
ſquare. Among ſeveral trunks and
put into the coach, was the box ment
ment. On arriving at the houſe in Or
ſecutor took all the articles out of tl
box, which remained under one of t
ſoner received his fare and drove av
after he was gone the box was miſſe
means were uſed that day to diſcover tl
out ſucceſs. Hand-bills were diſperſe
ing, and advertiſements inſerted in the
ing a reward to any perſon who ſhould
Two days afterwards two perſons calle
houſe in Orchard-ſtreet, and deſired
Gentleman who had loſt the box; but h
be at home, they left the number of the
had been left, and the nick-name of the
very next morning, as the proſecutor w
born, he diſcovered both the coach an
at a door for his fare. The priſoner,
immediately ſaid, "Sir, I and my wife
this very day with the box, but I did
no perſon was at home to pay the three
for finding it; and wanting money very
ried it to one Michael Mitchel ... I...

ing in her custody. The prisoner accused the Jew of having burned the bonds. The Jew retorted the same charge upon the prisoner.

The learned Judge observed, that as it appeared the prisoner had not originally taken possession of the property himself, but that it had been thrown upon him by the negligence of the prosecutor, in leaving it behind him in the coach, no felonious intention could be supposed to exist in his mind at the moment the property was first acquired; and although the subsequent circumstance of his keeping it till it was advertised, was a breach of moral duty, it could not of itself be legally considered as a criminal conversion. He therefore directed the Jury, that if they thought the prisoner had detained the box merely in the hope and expectation that a reward would be offered for its restoration, and that he meant then to return it to its right owner, they ought to acquit him; but that, on the other hand, if they were in their consciences perfectly satisfied that he had uncorded the box, not merely from natural though idle curiosity, but with an intention to embezzle any part of its contents, it would become a matter of legal consideration, whether a person so guilty should not be reached as a felon?

The Jury found the prisoner *Guilty*; but the judgment was respited, and the case submitted to the opinion of the TWELVE JUDGES.

In the July Session following, the prisoner was put to the bar, and informed by the RECORDER, that his case had been considered by the JUDGES, and that they approved of the verdict the Jury had given.

He received sentence of transportation for seven years.

JOHN SEARS'S CASE.

At the Old Bailey in January Session, 1789, John Sears was indicted before Mr. Justice *Ashhurst*, for *stealing* a parcel of callico, and other things, the property of Sarah Dixon. The prosecutrix hired the prisoner, who was a hackney-coachman, to drive her from her house in Manchester Buildings, to a linen-draper's in Oxford-Road, where she purchased the articles named in the indictment. They were tied up in a parcel, and put into the coach. The prisoner drove back to Manchester Buildings, and the prosecutrix, on getting out of the coach, ordered him to give the parcel to her servant; but he neglected so to do, and drove expeditiously

tiouſly away. The things were advertiſed, and a reward offered to any perſon who ſhould reſtore them; but without effect. A few days afterwards the proſecutrix met the priſoner; but he denied all knowledge of her perſon, or of the things, or of his ever having had ſuch a fare. The goods, however, were traced to the priſoner's poſſeſſion, and the parcel had been opened. The priſoner on his defence acknowledged that he had driven the proſecutrix from Mancheſter-Buildings to the linen-draper's and back again, but he denied that ſhe ever deſired him to deliver the parcel to her ſervant. Upon this evidence he was convicted of FELONY, and received ſentence of impriſonment for ſix months by virtue of the ſtatutes of 5 *Anne*, cap. 6, and 19 *Geo.* III. cap. 74, § 3.

REX v. JOHN PATCH.

At the Old Bailey in February Seſſion, 1782, John Patch was indicted before Mr. Juſtice *Gould*, preſent Mr Baron *Perryn*, and Mr. Juſtice *Buller*, for ſtealing a ſilver watch, a ſteel chain, a gold ſeal, two pieces of foreign coin, and ſeven ſhillings in money, the property of Jeremiah Bumſtead.

The proſecutor depoſed, that the priſoner, and two other perſons who made their eſcape, had joined company with him in the ſtreet, and after walking a ſhort ſpace one of them ſtooped down and picked up a purſe, which upon inſpection contained a ring, and a receipt for 147l. purporting to be the receipt of a jeweller for "a rich brilliant diamond "ring." The priſoner propoſed that they ſhould go into ſome public-houſe, to conſider in what manner their reſpective portions of this prize were to be divided, and accordingly they all four of them went into an ale-houſe on Saffron-hill. Various modes of diſtribution were ſuggeſted: at length the priſoner aſked the proſecutor, if it would be agreeable to him to take the ring into his own poſſeſſion, and to depoſit his money and his watch as a ſecurity to return it upon receiving his portion of its value. The proſecutor aſſented to this propoſal; and ſigned a written agreement, "That when the priſoner, or either of the other two men "returned the watch and money, and *ſeventy pounds*, he "would re-deliver to them the purſe and the ring." The proſecutor accordingly laid the watch and money mentioned in the indictment upon the table, and received the ring. The priſoner beckoned the proſecutor out of the room, upon a pretence

a pretence of ſpeaking to him in private; and during this interval the other two men marched off with the property. The abrupt manner in which they went away ſuggeſted to the proſecutor that he had been defrauded, and he ſecured the priſoner. The ring was valued at ten ſhillings.

It was objected by the priſoner's Counſel, that, as the proſecutor had parted voluntarily with the poſſeſſion of his property, it was a fraud only, and not a felony; but the COURT, upon the authority of *the King* v. *Pares*, p. 392. *infr.* referred it to the Jury to conſider, Whether the whole tranſaction was not an artful and preconcerted ſcheme in the three men, feloniouſly to obtain the proſecutor's watch and money?

The Jury found the priſoner guilty; and he was ſentenced to raiſe gravel three years on the river Thames.

HUMPHREY MOORE'S CASE.

This was a caſe reſerved for the opinion of the TWELVE JUDGES by *James Adair*, Eſq; RECORDER, at the old Bailey, in April Seſſion, 1784, upon the trial of an indictment for ſtealing Twenty Guineas, and four pieces of foreign gold coin called Doubloons, the property of John Field, in the dwelling-houſe of John Brown.

The material circumſtances of this caſe, as they appeared in evidence, were as follow: The proſecutor John Field, a ſoldier, juſt returned from the war in America, was walking along James-ſtreet, Covent-Garden, when a ſtranger joined company with him. As they walked in friendly converſation with each other down Long-Acre, the ſtranger ſuddenly ſtopped, and picked up a purſe which was lying at a door. After they had proceeded about forty yards, "Come," ſays the ſtranger, "we will go and drink a pot of porter, and ſee what we have picked up." The proſecutor was perſuaded to comply; and they accordingly went into a private room in an adjacent public-houſe, where the ſtranger pulled out the purſe, and from one end of it produced a receipt, ſigned "*W. Smith*," for 210l. for one brilliant diamond cluſter-ring, and from the other end he pulled out the ring itſelf. A converſation enſued upon the ſubject of their good fortune, during which time the priſoner Humphry Moore entered the room; and, being ſhewed the ring, he praiſed the beauty of its luſtre, and offered to ſettle the diviſion of its value. Upon the ſtranger lamenting that he had no money, the priſoner aſked the proſecutor if *he* had any. The proſecutor replied,

replied, that he had *forty* or *fifty pounds* at home. "That ſum will juſt do," ſaid the priſoner. A coach was immediately called, and all three were driven to the proſecutor's lodgings at Chelſea. The proſecutor and the ſtranger went into the houſe together, leaving the priſoner at the door. The proſecutor took his money from his bureau, put it into his pocket, and returned with the ſtranger to a public-houſe in the Five Fields, Chelſea, kept by John Brown, where they again met the priſoner, who ſaid, "I will give you your ſhare of the ring, if you will be content till to-morrow." The proſecutor put down Twenty Guineas and four Doubloons, which the ſtranger took up, and in return gave the proſecutor the ring; deſiring that he would meet him at the ſame place on the next morning at nine o'clock, and promiſing that he would then return the Twenty Guineas and the four Doubloons to the proſecutor, and alſo One Hundred Guineas for his ſhare of the ring. The priſoner and the ſtranger went away together. The proſecutor attended the next morning purſuant to the appointment, but neither of the parties came. The ring was of a very trifling value.

It was left with the Jury to conſider, Whether the priſoner and the other man were not in concert together; and they were of opinion, that the priſoner was confederating with the perſon unknown for the purpoſe of obtaining the money by means of the ring, and did therefore aid and aſſiſt the perſon unknown in obtaining the Twenty Guineas and the four Doubloons from the proſecutor. They accordingly found him guilty of ſtealing, but not in the dwelling-houſe, ſubject to the opinion of the TWELVE JUDGES, whether it was felony.

On the firſt day of Michaelmas Term 1784, all the Judges, except Lord *Mansfield*, aſſembled at Lord *Loughborough's* Chambers, to conſult upon this caſe; and in the December Seſſion following Mr. Juſtice *Willes* delivered their opinion at the Old Bailey to the following effect: All the JUDGES agreed, That, in conſidering the nature of larceny, it was neceſſary to attend to the diſtinction between the parting with the poſſeſſion and the parting with the property only; that in the firſt caſe it is felony, and in the laſt caſe it is not. Upon the circumſtances of the preſent caſe two of the Judges were of opinion, that the Doubloons were to be conſidered as money, and that the whole was a loan on the ſecurity of the ring, which the proſecutor believed to be of much greater value than the money he advanced on it, and therefore that the poſſeſſion as well as the property was parted with: but nine of the Judges were clearly of opinion, that it was felony; for

for they thought the Twenty Guineas and the four Doubloons were only depoſited in the nature of a pledge till the half of the ſuppoſed value of the ring was paid to the proſecutor, and therefore he had parted with the property only, and not with the poſſeſſion; and they could not diſtinguiſh this caſe from *the King* v. *Patch*, tried in this Court before Mr. Juſtice *Gould*, in February Seſſion, 1782, and *the King* v. *Pares*, in September Seſſion 1779. The majority of the Judges therefore were of opinion, That this caſe had been properly left to the Jury; and that the priſoner was guilty of felony.

The priſoner was accordingly tranſported.

REX v. DAVIS.

The following caſe, on *the black Act*, was reſerved by Mr. *Baron* PERRYN, at Hereford Summer Aſſizes, 1788, for the opinion of the TWELVE JUDGES.

The words of the ſtatute are, "That if any perſon or perſons ſhall *wilfully* and *maliciouſly* ſhoot at any perſon in any dwelling-houſe, or other place, every perſon ſo offending ſhall be deemed guilty of felony, and ſuffer death without the benefit of clergy."

The Indictment ſtated, "that James Davis, being an ill-deſigning and diſorderly perſon, of a wicked and malicious diſpoſition, &c &c. with a certain piſtol, loaded with gunpowder and a leaden bullet, which he the ſaid James Davis in his right-hand had and held, he the ſaid James Davis did *unlawfully*, *maliciouſly*, and *feloniouſly* ſhoot at one ——. &c.

The Queſtion was, Whether the indictment could by any poſſible conſtruction, or implication, be ſupported, the drawers of it having neglected to purſue the very words of the ſtatute, by leaving out the word "*wilfully*," and inſerting only that the offence was committed "unlawfully, *maliciouſly*, and feloniouſly?"

The Judges aſſembled at Lord *Kenyon's* houſe on 22d February, 1789, to conſider this queſtion, and the point was very much debated.—Some of the JUDGES thought that the word *wilful* was implied in the word *malicious*; but a great majority were clearly of opinion, that as the Legiſlature had by the ſpecial penning of the Act, uſed both the words "*wilfully*" and "*maliciouſly*," they muſt be underſtood as a deſcription of the offence; and that the omiſſion, in the preſent indictment, was fatal to its validity.

The priſoner, at the enſuing Aſſizes, was ordered to be diſcharged.

JOHN

JOHN PARE'S CASE.

This caſe was reſerved by Mr. Juſtice *Aſhurſt* at the Old Bailey in September Seſſion, 1779.

The priſoner was indicted for ſtealing a black mare, the property of Samuel Finch. It appeared in evidence, that Samuel Finch was a livery-ſtable-keeper; and that the priſoner had hired the mare of him to go to Sutton in Surrey and back again, ſaying he lodged at N° 25 in King-ſtreet, and ſhould return about eight o'clock the ſame evening. He did not return; and it was proved that he had ſold the mare on the very day he had hired her, to one William Holls, in Smithfield-market; and that he had no lodging at the place to which he had given the proſecutor directions.

The Jury found that the facts above ſtated were true; and alſo that the priſoner had hired the mare with a fraudulent view, and intention of ſelling her immediately.

The queſtion was referred to the JUDGES, Whether the delivery of the mare by the proſecutor to the priſoner, had ſo far changed the poſſeſſion of the property, as to render the ſubſequent converſion of the mare a mere breach of truſt, or whether the converſion was felonious?

The JUDGES were unanimouſly of opinion, That the queſtion, as to the original intention of the priſoner in hiring the mare, had been properly left to the Jury; and as they had found, that his view in ſo doing was fraudulent, the parting with the *property* had not changed the nature of the *poſſeſſion*, but that it remained unaltered in the proſecutor at the time of the converſion, and that the priſoner was therefore guilty of felony.

THE

THE LAWYER'S AND MAGISTRATE'S MAGAZINE.

For JULY, 1790.

The Trial of RENWICK WILLIAMS, before Mr. Justice BULLER, at the Old Bailey, July 8, 1790.

CLERK of the arraigns.—Renwick Williams, hold up your hand. You ſtand indicted by the name of Renwick Williams, for that you, on the 18th of January laſt, with force and arms, at the pariſh of St. James, Weſtminſter, in the King's highway, in a certain public ſtreet there, called St. James's ſtreet, unlawfully, wilfully, maliciouſly, and felonioufly, did make an aſſault on Ann Porter, ſpinſter, with an intent to tear, ſpoil, cut, and deface her garments and cloaths, and the ſame day with force and arms in the ſame public ſtreet, wilfully, maliciouſly, and felonioufly did tear, ſpoil, cut, and deface her garments, to wit; one ſilk cloak, value 10s. one ſilk gown, value 10s. a pair of ſtays, value 5s. a ſilk petticoat, value 5s. one other petticoat, value 5s. a linen petticoat, value 5s. and a ſhift, value 5s. her property, part of the apparel which ſhe had on her perſon, againſt the form of the ſtatute, and againſt the King's peace, &c.

Counſel for the Proſecution.
Mr. PIGOTT, Mr. SHEPHERD.

Counſel for the Priſoner.
Mr. KNOWLYS.

Ann

Ann Porter ſworn.

Mr. Shepherd. I believe, Madam, you live in St. James's Street?

Miſs Porter. Yes, Sir. On the Queen's birth-night, I went to the Palace; I left the palace about a quarter paſt eleven, and came from thence towards my father's houſe.

Q. Who was with you?

A. My ſiſter and Mrs. Mead.

Q. Did you, on that evening, ſee the priſoner at the bar?

A. Yes, Sir, but not till I was at my own door.

Q. Did you perceive any thing remarkable in the conduct of your ſiſter, or the lady who was with you, before you came to your own door?

A. Yes, Sir; my ſiſter deſired me to make haſte, and we went as faſt as we could; ſhe ſaid ſomething elſe, but I did not diſtinguiſh the words. My ſiſter went firſt to the door, Mrs. Mead followed her, and I was the laſt; my ſiſter went firſt to ring the bell.

Q. Did any thing happen to you at the door of your father's houſe?

A. Yes; juſt as I was paſſing the corner of the rails, I felt a violent blow on my hip; I turned round to ſee from whom it proceeded, and I ſaw that man ſtoop down.

Q. That man?

A. Yes, Sir, that man.

Q. Before I aſk you any other queſtion about what paſſed that time, you ſay it was that man?

A. Yes, Sir.

Q. Had you ever ſeen him before?

A. Yes, three or four times.

Q. When you had ſeen him before, had he ſaid any thing to you?

A. Yes; he had.

Q. Did you know him as an acquaintance?

A. I know no more of him than walking in the middle of the day, he inſulted me and my ſiſters with very groſs and indelicate language; he walked behind me and muttered.

Q. I do not aſk you to repeat what he ſaid to you; but in what manner did he ſpeak, and what ſort of language?

A. Very groſs, and very abuſive.

Q. Had that happened to you more than once?

A. Yes, Sir, three or four times.

Q. At the times when he accoſted you in that way, had you any opportunities of obſerving his perſon?

A. Yes, Sir, becauſe it was in the day time.

Q.

Q. When you was ſtanding at the door of your father's houſe, and received this blow, and turned round and ſaw the man ſtooping down, did you at that time recognize that man to be the ſame that had ſpoken to you?

A. It ſtruck me immediately to be the ſame man; I knew him the moment.

Q. How long did he continue at your father's door after he gave you this blow?

A. I cannot ſay, Sir; he did not run away: I was very much ſhocked at the ſight of him; I endeavoured to paſs on the ſide of the door; I felt a very ſtrange ſenſation, and I fancy he muſt have paſſed at the ſame time I did; he ſtood oppoſite to me and ſtared in my face; he walked up to the top of the ſteps on the oppoſite ſide of the door I was of, and ſtood as cloſe to me as he poſſibly could.

Q. Had you then a full and complete opportunity of obſerving his face?

A. Yes, perfectly.

Q. Look at him; have you any doubt of that being the perſon that ſtruck you the blow?

A. No, Sir, I have not the ſmalleſt doubt; I could not have been poſitive, but I ſaw him three or four times before; I ſuffered ſo much from the inſults I received, that it is impoſſible I could be miſtaken; I could never forget him.

Q. In what manner were your cloaths cut?

A. They are here; Sir.

Q. Did they appear to be cut with a ſharp inſtrument?

A. Yes, a very ſharp one.

Q. How long after this circumſtance had happened to you did you next ſee the priſoner?

A. Not till Sunday evening as I was walking in the park, the 13th of June, with my mother and all my ſiſters; Mr. Coleman was with me, and his brother with my mother and ſiſters.

Q. Did you ſee the priſoner?

A. Yes; we were in the Mall, and he paſſed me very cloſe.

Q. Did he meet you, or paſs you?

A. He met me, and paſſed me very cloſe; I was ſtruck with his appearance; I knew him the moment I ſaw him; I was very much agitated, and Mr. Coleman aſked me the reaſon. I knew him the monent I ſaw him; I turned round to look at him, and he was turning back to look at me.

Q. When was the next time you ſaw him?

A. N

A. At my own houſe that evening; Mr. Coleman brought him.

Q. Did you recognize him when he came into your houſe?

A. I was in ſuch a ſtate, I was almoſt inſenſible.

Q. Have you had ſince that time an opportunity of ſeeing him more than once, and of recollecting whether he is or is not the man?

A. I wanted no recollection; I knew him the moment I ſaw him; I knew him the next day at Bow-ſtreet.

Q. When you ſaw him at Bow-ſtreet, was he pointed out to you, or did you know him as ſoon as you ſaw him?

A. I knew him the moment I ſaw him.

Mr. Knowlys, Priſoner's Counſel.—I do not wiſh to aſk you any queſtions to confuſe you; I aſſure you there is no man in this Court that feels more ſincerely for the pain that has been occaſioned to you by ſome perſon or other, than I do; I muſt aſk you a few queſtions that are neceſſary to my duty.—You ſay you live in St. James's Street?

A. Yes.

Q. You ſay only with one ſiſter and Mrs. Mead, you went to the ball room?

A. Yes, Sir.

Q. As you were coming home, how far was you from St. James's, before your ſiſter ſpoke to you, telling you to run?

A. A few doors up the ſtreet.

Q. You ſay you did not hear what your ſiſter ſaid, when ſhe deſired you to run?

A. I did not.

Q. I take it, that it flurried you a little?

A. I was not agitated then; I ran faſt; I thought ſhe had ſome motive.

Q. Did you run as faſt as you were able to run?

A. I ran particularly faſt.

Q. You were at that time, ladies unprotected by any gentleman?

A. Yes.

Q. Have you any recollection at the time, whether the door was open, and your ſiſter and Mrs. Mead had got in before this happened?

A. No, Sir, the door was not open till after.

Q. I think you deſcribe that you felt a pretty violent blow, very violent indeed?

A. Very much ſo.

Q. Before you felt this violent blow you had not ſeen the perſon whom you ſuppoſed to be the priſoner?

A. No.

Q. I take it then you was a good deal alarmed and turned round to ſee from whence it came: did not the blow give you a very ſudden alarm and flutter?

A. Yes, it did.

Q. How cloſe was the perſon to the houſe, at the time you turned round?

A. He was cloſe to the rails, and as cloſe to me as he could be.

Q. In the middle of the ſtreet; I take it there was a great deal of light?

A. Our houſe is ſurrounded with lights.

Q. Were you at all able to obſerve the dreſs he was in at that time?

A. I know he had a light coat on, which fell acroſs his ſhoulders; I believe he had another coat under that.

Q. Can you be accurate as to the time when this matter happened?

A. It was exactly a quarter paſt eleven: my father and two friends were come to fetch us: I was rather anxious as the Queen retired ſo early, and Mrs. Mead deſired me to look at my watch, which I did; that was while we were in the Ball-room, the inſtant we quitted the gallery; and I do not think it was above five minutes before we got to our door.

Q. All the other times you had ſeen him, it was in the day time?

A. No; once I ſaw him at Ranelagh, at night, while we were waiting for a coach. (*The cloaths produced.*) This is the gown I had on.

Q. Was that rent in the gown the effect of the blow you received?

A. Yes.

Q. You can put that in a wearable ſtate without much difficulty?

A. No, Sir. (*The ſhift produced which was cut.*)

Mr. Shepherd. *Q.* Your perſon was hurt, as well as your cloathes were cut?

A. Yes, Sir.

Q. Was it with a ſharp inſtrument?

A. I did not ſee the inſtrument, but it muſt be a ſharp inſtrument.

Q. Was the ſtreet light enough to diſtinguiſh every perſon's face who ſtood as near to you as the priſoner did?

A. Yes,

A. Yes, it was quite light enough.

Sarah Porter ſworn.

Mr. Piggot. Will you pleaſe to look at the priſoner at the bar; did you ever ſee him before the 18th of January?

A. Yes.

Q. Were you acquainted with him?

A. No.

Q. Where then have you ſeen him?

A. In the ſtreet at different times; he has followed me, and talked to me.

Q. Were your ſiſters with you at the time?

A. Yes; my eldeſt ſiſter, and one of the others.

Q. In what manner, I do not mean to be particular, did he accoſt you?

A. In walking cloſe behind me with his head quite leaning over my ſhoulder, and talking the moſt dreadful language that can be imagined.

Q. The moſt groſs, ſhocking language?

A. Dreadful.

Q. Have you ever heard any other ſort of language from him?

A. No.

Q. How many times might you have ſeen him in this manner before the 18th of January?

A. Four times he ſpoke. I obſerved him particularly, and perfectly know his perſon.

Q. Did you ſee the priſoner at the bar on the 18th of January?

A. Yes; at the bottom of St. James's ſtreet; at about half an hour paſt eleven; it was a quarter paſt eleven when we left the ball; he was ſtanding with his back towards me; he was looking down the ſtreet.

Q. Are you ſure it was him?

A. Oh, I am certain it was him; I knew him before I came up to him; ſome chairmen were paſſing by, who ſaid, By your leave! upon which he ſtarted round, ſtared in my face and looked again, and ſaid Oh, oh! and inſtantly gave me a violent blow on my head, the back part of my head.

Q. Upon that, what did you do?

A. I requeſted my ſiſter to run; I ſaid, Nancy, for God's ſake make haſte, do not you ſee the wretch is behind us? a name we always diſtinguiſhed him by.

Q. There was another lady with you, I underſtand; did you all run?

A. Yes, as faſt as we could; I ran firſt to ring at the door; while I was ringing at the door, I turned round to ſee if he was coming, and I ſaw him run paſt acroſs the ſtable-yard; he was cloſe to my ſiſter, and he ſtooped down; I was terrified, and I called out again; the words were half uttered, when he ruſhed between Mrs. Mead and me, and I ſaw him ſtrike with the greateſt violence, and I heard the ſilk rent; his hand was ſhut, I obſerved particularly.

Q. Was the man whom you ſaw ſtrike in conſequence of which you heard the gown rent, the ſame man who had ſpoke to you in the ſtreet four times before?

A. Yes, I am confident of it, and there was no other man near; I ſaw him perfectly; I have no doubt in the world; I am as clear as I am of any thing.

Q. Was there ſufficient light to enable you to diſcover his perſon?

A. The ſtreet was very much illuminated.

Q. What ſtate did you find your ſiſter in?

A. My ſiſter followed me in; I ran as faſt as I could, and I turned round, and he was on the threſhold of the door; our paſſage was very light, which gave me particular opportunity of ſeeing him perfectly.

Q. When did you next ſee him?

A. I ſaw him the week before he was apprehended, go down St. James's-ſtreet; I was ſitting at work at the front window, and my ſiſter was ſtanding at the other; I was ſo exceſſively terrified, that I ſaid, Good God, Nancy, look over the way! and ſhe immediately ſaid, There is the Wretch that wounded me. We ſent two men after him, but they unfortunately followed another man.

Q. When you went to Bow-ſtreet, did any body point him out of the crowd, or did you yourſelf ſelect him?

A. Sir Sampſon Wright deſired me to look round, and I pointed him out directly: he was ſtanding indifferently among the crowd, and I pointed him out.

Q. Upon looking at the priſoner at the bar, have you the ſmalleſt doubt that the priſoner is the perſon?

A. If I had any ſhadow of doubt, I would not have ſworn to him; but I am certain of it.

Mr. Knowlys. *Q.* I believe you know, in point of fact, that there is another indictment againſt the priſoner, at your ſiſter's proſecution, for cutting her, is there not?

A. Yes.

Rebecca Porter ſworn.

Mr. Shepherd. *Q.* You are the ſiſter of the two laſt witneſſes?

A. Yes.

Q. You

Q. You were not with your ſiſters at the Ball-room on the 18th of January?

A. No. I was not.

Q. Did you ever ſee the priſoner at the bar before?

A. Yes, I have ſeen him ſeveral times.

Q. Did you ever ſee him any time when he was with your ſiſter?

A. I ſaw him once when I was with my ſiſter Ann.

Q. Did you ever ſee him accoſt your ſiſter?

A. Yes, he accoſted us both that time.

Q. I do not aſk you to expreſs it, but what ſort of converſation, what ſort of language did he make uſe of?

A. The moſt horrible I ever heard in my life.

Q. Are you ſure that the ſame perſon who accoſted your ſiſter Ann is the priſoner at the bar?

A. Yes, I am ſure of it; I have not the leaſt doubt, Sir.

Martha Porter ſworn.

Mr. Piggot. Look at the priſoner at the bar; did you ever ſee that man before?

A. Yes, Sir, ſeveral times; the firſt time I ever ſaw him, my ſiſter Ann was with me; he accoſted her.

Q. In what manner did he accoſt her? I do not wiſh you to ſtate the words he uſed.

A. In the moſt horrid manner poſſible.

Q. Then you heard the words he uſed?

A. Yes, Sir, and very dreadful words they were.

Q. Have you any doubt that is the man that ſtands there?

A. No, Sir, I am poſitive that is the man?

Q. Did you ſee him at Bow-ſtreet, at the time he was apprehended?

A. Yes, I did.

Q. And you are poſitive that is the man?

A. Yes, Sir, I am very poſitive.

John Coleman ſworn.

Mr. Shepherd. *Q.* Do you remember being with Miſs Porter on the 13th of June laſt, in St James's Park, in the evening?

A. Yes; I perceived her very much agitated, and ſhe told me the Wretch had juſt paſſed her; ſhe pointed him out to me.

Q. Was that the perſon ſhe pointed out to you?

A. That was the perſon; I followed him, and he walked exceedingly faſt; I followed him out of the Park, by the of Spring-Garden-Gate; he walked as low as the

ralty; he paſſed down the Admiralty paſſage; then he perceived I was following him; he looked up at a houſe, and then turned round and ſaw me: I am very ſure he ſaw I was following him; he walked to the bottom of this paſſage, and walked up Spring Gardens again; then he went along Cockſpur-Street, into Pall-Mall.

Q. At what diſtance might you follow him?

A. I ſuppoſe a number of times it was not a yard, ſometimes four or five yards; he went up St. James's-Street; then I overtook a gentleman, an acquaintance of mine, and he went with me, and we went up to the top of St. James's-Street, he croſſed over by the White-Horſe-Cellar, and went down by the Duke of Devonſhire's wall; then he went into Bolton-Street, and knocked at a door, and went in; in about five minutes he came out; I immediately followed him; he went down St. James's-Street again, and knocked at the door of a china-ſhop; I was at the ſtep of the door, the ſame time that he was; a man ſervant came down to the door; he aſked ſome queſtion, I do not know what; the ſervant was going to ſhut the door, I prevented him from ſhutting the door; the priſoner was then in hearing, and I aſked the ſervant, who opened the door, whether he knew the perſon who knocked at the door juſt now; he ſaid no, he did not know him: I then followed him up St. James's-Street and Bond-ſtreet. I did every thing that laid in my power to inſult him, by walking behind him, walking before him, looking at him very full in the face, making a noiſe behind him; he would not take any inſult; he never ſaid a word; I followed him behind, and I behaved in this kind of way, (peeping over his ſhoulders, and making a clapping with my hands), and I was going to knock him down once or twice; he croſſed Oxford-Road, and went into Vere-Street; he knocked at a door there which had a bill againſt the ſhutter; it was a ſhop, and a bill againſt the door; I do not recollect what was the bill; I there ſpoke to him, I was leaning on the rails; in a very impertinent manner I told him, Sir, this is an empty houſe: he ſaid no, it was not, for he knew the people very well, their names were Pearce, and he knocked again, but nobody came to the door; from thence he went into South-Molton-Street, he knocked at the door of Mr. Smith. I was behind him, very cloſe indeed. I aſked Mr. Smith to ſee the priſoner; Mr. Smith introduced me to the priſoner in the dark in the front parlour, he deſired I would walk into the parlour; I began to make an apology for my rude behaviour to this gentleman, and I told him, I thought it very odd he did not take

any notice of my manner of proceeding: I told him, I had come to a reſolution to know his addreſs, and would give him mine; he ſaid he thought it was very proper that I ſhould aſſign ſome reaſon for my wiſhing to know his addreſs; I did not know what reaſon to aſſign; I was a little agitated; I did not like to ſay, Sir, you are ſuppoſed to be this Monſter; and I told him at laſt that he had inſulted ſome ladies that I was very intimate with, who had pointed him out to me, and as far as lay in my power I would have ſatisfaction for that inſult; he ſaid, Good God! I never inſulted any ladies in my life; I told him I was not ſure he was the man, but he muſt favour the ladies with a ſight of him; Mr. Smith ſaid, that I talked very fair, and that he thought it was very proper to give his addreſs to me: Mr. Smith wrote my addreſs, and then the priſoner's "Mr. Williams, N° 52, Jermyn-Street." I ſaid, Williams, Williams, I have ſome recollection of you; I think I know you: he ſaid, I know you too, and he aſked if I was not introduced at a ball in Bond-Street to which he belonged; I told him no, but I recollect being introduced to a little aſſembly that he had belonged to; I ſaid, It is very odd I ſhould follow you ſo long and not know you before; he ſaid, It is very odd I ſhould not know you; we went contrary ways; I went up South-Molton-Street, and he went down South-Molton-Street.

Q. Did you go to N° 52, Jermyn-Street?

A. No, I did not; I walked down Bond-Street, and I conſidered within myſelf that I had acted very improperly in letting him go; I overtook him in Piccadilly near the top of St. James's-Street; he ſaid to me, We meet again! I ſaid, We do meet again: walking down St. James's-Street, I ſaid, Good God! Williams, I do not think you are the perſon I took you for; if you will give the Ladies an opportunity of ſeeing you this evening, it will be better: he ſaid, It is late; I ſaid, It is late, but it is not far from here where the Ladies live: we walked down St. James's-Street, nearly oppoſite Mr. Porter's door*; I then aſked him to croſs the way; we were croſſing over the way together; nobody was with me but the priſoner, and my brother was croſſing the way with the two Miſs Porters; we went up to Mr. Porter's door; I deſired the priſoner to walk in; he looked at the houſe and ſaid, Good God! this is Mr. Porter's. I ſaid, Yes; I introduced the Gentleman to the Ladies in the parlour, and two of the Miſs Porters immediately fainted

* Mr. Porter kept the Houſe called Pero's Bagnio, in St. James's-[illegible]

away: that was Miſs Sarah Porter and Miſs Ann Porter, exclaiming, "Oh, my God! Coleman, that is the wretch."

Q. Did you ſay any thing when you introduced him?

A. No, Sir.

Q. Before they exclaimed in this way, and fainted away, had you particularly pointed him out as the man, or had you only introduced him into the parlour?

A. No, I deſired him to walk in.

Q. How did the priſoner conduct himſelf at the time they fainted away?

A. He did not conduct himſelf in any particular way; I thought he poſſeſſed very great reſolution in caſe he was the guilty man.

Q. Did he ſay or do any thing when the Miſs Porters cried out, That is the wretch?

A. He ſaid, The Ladies behaviour is extremely odd; he ſaid, Good God! they do not take me for the perſon about whom there has been ſo many publications? I anſwered, It really is ſo, Sir; I do not recollect he made any anſwer to it.

Q. How long did he ſtay there?

A. He was there an hour; Miſs Porter thought proper to ſend for ſome ladies; I heard him ſay once or twice that the ladies were prejudiced.

Court. *Q.* What anſwer did he give; or did he give any when you ſaid it really was ſo?

A. I do not think he ſaid any thing; I cannot ſay; I did not make any particular obſervation.

Croſs-examined by Mr. Knowlys. When you gave your reaſons for wanting his addreſs, he gave you an addreſs where he was to be found?

A. Yes.

Q. When he got to Miſs Porter's he was not at all embarraſſed?

A. Not in the leaſt.

Patrick Macmanus ſworn.

Mr. Piggot. *Q.* Did you ever ſee the priſoner at the bar?

A. Yes.

Q. Where did he lodge?

A. In Bury-Street, Jermyn-Street.

Q. At what houſe?

A. At the George public-houſe.

Q. What lodging had he there?

A. It was a room where there were two beds, and a little room parted off, and in that there was another bed,

bed, but there was no way in but through the two-bedded room.

Q. What ſort of a public-houſe?

A. I believe they are good people.

Q. Did you ſearch his lodging?

A. Yes, in the lodging I found theſe two articles in a box, which I underſtood had been opened the day before by ſomebody elſe.

Q. Did you find any cloaths?

A. They are here; a coat, a hat, and a pair of ſhort boots. I ſhewed him theſe cloaths found at his lodgings, and he ſaid they were his; the coat is lapelled; I have ſeen him myſelf in this coat before.

Mr. Knowlys. Q. You ſay that the lodging was not a dear one; the people were good?

A. As good as any that keep a public houſe.

Q. That is a cloſe-bodied coat?

A. Yes.

Q. Is it a coat to wear over another?

A. No, I think not.

Jury. It is not a ſurtout coat, certainly.

Court. What number was it?

A. I do not know the number.

Q. Did you ever hear the priſoner ſay he lodged there?

A. I did.

Mr. Knowlys. On ſearching the lodging of the priſoner did you find any cutting inſtruments?

A. No, Sir.

Court. I want to know whether the direction he gave, N° 52, Jermyn-Street, might apply to the houſe in Bury-Street. Where did the mother live?

A. In Duke-Street, which goes out of Jermyn-Street.

Q. Whether a direction, N° 52, Jermyn ſtreet, might carry a man to that houſe in Bury-ſtreet, which goes out of Jermyn-ſtreet, in order to ſearch for any perſon they wanted?

A. I ſhould not look for it in Bury-Street.

Court. Macmanus's evidence is perfectly irrelevant to the caſe, as to this circumſtance, whether the reſidence of the priſoner does or does not correſpond with the card given to Coleman.

Court to Coleman. Was that addreſs which the priſoner gave you in writing, one that he wrote down after you aſked for his addreſs, or had he it ready written before?

A. Mr. Smith wrote it.

Q. By his direction?

A

A. Yes, my Lord.

Mr. Tomkins, Surgeon, ſworn.

Mr. Shepherd. *Q.* I believe you attended Miſs Ann Porter after ſhe was hurt?

A. I did.

Q. From the nature of the wound which ſhe had, muſt it have been made with a ſharp inſtrument?

A. A very ſharp inſtrument.

Q. Did you examine the cloaths?

A. I did; I examined the gown, which was conſiderably cut, and the petticoat too; I am not ſure whether I ſaw the ſhift; I believe I did not.

Q. Did it appear to be done with the ſame inſtrument, and at the ſame time?

A. Certainly.

Q. How deep was the wound?

A. The firſt part of the wound was only through the ſkin, the middle part was at leaſt three or four inches deep, and then it run about three inches more through the ſkin only. The whole length of the wound was, I believe, between nine or ten inches.

Mr. Knowlys. *Q.* Whether a cut with a ſharp inſtrument, merely to cut the cloaths, would have wounded ſo deep as that?

A. That I do not know; it muſt have been with great violence; part of the blow was below the bow of the ſtays; if not, it would probably have pierced even the abdomen.

Mr. Knowlys to Macmanus. You called at his mother's houſe?

A. Yes.

Q. Was not it the corner of Duke-Street, and Jermyn-Street?

A. Yes.

Q. Was it No. 52?

A. I do not know; it is a perfumer's ſhop.

Court. In which ſtreet was the door of the mother's houſe?

A. I went in at Jermyn-Street; I do not know whether there was any other door or not.

Priſoner's Defence.

My Lord, and Gentlemen of the Jury, I ſtand here an object deſerving your moſt ſerious attention and compaſſion; from conſcious innocence of the very ſhocking accuſations made againſt me, I cannot but hope that juſt and really li-

beral

beral minds will have reaſon to commiſerate my ſituation, and muſt feel me deſerving pity and compaſſion. I admit in juſtice that I ſhould have experienced the hardſhips I have ſuffered in the proceſs of the law againſt me, till my innocence could be proved; but while I revere the law of my country, which preſumes every man to be innocent till proved guilty, yet I muſt reprobate the cruelty with which the Public Prints have abounded, in the moſt ſcandalous paragraphs, containing malicious exaggerations of the charges preferred ſo much to my prejudice, that I already lie under premature conviction, by an almoſt univerſal voice. I chearfully reſign my caſe into the hands of this tribunal, and which, I truſt, will not ſuffer the fate of a fellow-creature to be determined by popular prejudice. I reſt my caſe to the deciſion of an Engliſh Jury; and, in hopes of being able to eſtabliſh my innocence in your opinion, I moſt ſeriouſly appeal to the Great Author of Truth, that I have the ſtrongeſt affection for the happineſs and comfort of the ſuperior part of this creation, the fair ſex, to whom I have, in every circumſtance that occurred in my life, endeavoured to render aſſiſtance and protection. I have nothing, my Lord and Gentlemen, further to ſay, but that, however ſtrange and aggravated this caſe may appear to you, I ſolemnly, and with the utmoſt ſincerity, declare to you all, that this proſecution of me is founded in a dreadful miſtake, which I hope the evidence I ſhall bring will prove to your ſatisfaction.

WITNESSES FOR THE PRISONER.

Amarvel Mitchell ſworn. (The witneſs being a foreigner, an interpreter was ſworn.)

Mr. Knowlys. Q. What buſineſs are you, and where do you live?

A. A flower-maker, in Dover-Street, Piccadilly.

Q. Do you know the priſoner?

A. Yes. Between eight and nine months he worked with me.

Q. Was he at work with you on the Queen's birth-day, the 18th of January?

A. Yes. He worked from nine in the morning till one; he returned at half after two, and worked till twelve at night; and then after that he ſupped with me, and ſtaid till half after twelve; we uſually only worked till nine o'clock; on that day we worked till twelve; we ſupped at twelve.

Q. Are you, or are you not ſure, that the priſoner was at work all that time, from half paſt two till twelve, when you went to ſupper?

A. Yes.

Q. At what time did the priſoner quit your houſe?

A. At half paſt twelve at midnight.

Q. If he was abſent any ſpace of time, muſt you have obſerved it?

A. I ſhould certainly have perceived it, and taken notice of it.

Q. How many perſons were there employed in the houſe with you?

A. Myſelf, my ſiſter, two work-women, and the priſoner; the work-women lodged at the houſe.

Q. What character is the priſoner?

A. I can give him the beſt character a man can have.

Q. Did he behave with civility and good nature to the young ladies that worked with him in the houſe?

A. Always perfectly well; no reproach at all to the man; there were two people that were at work that day, did abſent themſelves two or three times, one went out at eleven, and the women went out at half after.

Mr. Pigott. *Q.* How long have you been in this country?

A. Almoſt four years.

Q. Have you the whole of the houſe in Dover-Street, Piccadilly?

A. Only the ground-floor.

Q. How long have you known the priſoner?

A. I do not exactly recollect when he firſt came to me; it was either in November or December: he offered himſelf to me to work.

Q. Nobody introduced him?

A. No.

Q. You took him in that way.—What does your family on this ground-floor conſiſt of?

A. Myſelf, my ſiſter, and two work-women?

Q. Who are the people that work at theſe artificial flowers?

A. Three women.

Q. Does any man work at this artificial flower-work, except the priſoner, at your houſe?

A. I have one man to cut out the flowers; that was the man that went out at eleven o'clock the ſame night; the other went at half an hour after.

Q. Then there is no other man who worked at the trade but the priſoner, the other three being women.—At what hour in the evening did they generally leave the work?

A. At nine.

Q. How

Q. How many times in the year may you have worked till twelve at night.

A. We were very full of buſineſs for about a fortnight before this; commiſſions from Ireland; and the priſoner always worked extra hours with the reſt.

Q. Do you mean to ſay that every evening for fourteen days before this you worked till twelve at night?

A. I cannot ſay every day for the preceding fortnight, but every day for the laſt nine days.

Q. What day of the week was the Queen's birth-day?

A. On Monday.

Q. What time did you go home that day?

A. I returned home about ſix in the evening.

Q. What time did you go out?

A. About three o'clock.

Q. Had you no curioſity after ſix o'clock to go out that evening?

A. I could not, for a commiſſion from Ireland demanded my attendance at home.

Q. Then, having this extraordinary work, how came you to indulge your curioſity in going till ſix o'clock?

A. The extraordinary order came to me after I came home at ſix in the evening; it was an order for a lady's gown, which preſſed me particularly.

Q. Then that was the reaſon for working till twelve at night?

A. Yes; becauſe it was a work that was to be finiſhed; and I promiſed to do it againſt the next morning, for which reaſon I kept the priſoner ſo late.

Q. For whom was that gown?

A. For Mrs. Abington.

Q. Who brought it?

A. Mr. Jerſo: he is a Frenchman.

Q. What is he?

A. He is a merchant of modes.

Q. Where does he live?

A. I think it is in Caſtle-Street, Leiceſter-Fields.

Q. When was this gown to be got ready?

A. There was no determined time, but as ſoon as poſſible. I delivered it between ten and eleven the next morning.

Q. Had none of your working people gone out, led by the attractions of the day, in the courſe of the day?

A. The three Engliſh women went out, becauſe I was not appriſed of this order.

Q. Then the three Engliſh women did not aſſiſt in [illegible] on?

A.

A. I gave them leave, at one o'clock, to leave work for that day, and to come the next morning.

Q. What time did the three Engliſh women come home?

A. They did not come back that day.

Q. Who then did work at this gown, after the order came in, till twelve at night?

A. The priſoner, my ſiſter, and two work-women who lodge in the houſe.

Q. Where did the priſoner dine that day?

A. I do not know.

Q. Did the priſoner uſually eat in your houſe?

A. Whenever I employed him beyond nine in the evening, he then uſed to ſup with me; but never except there was extraordinary work, and I wiſhed to have his aſſiſtance.

Q. Did the priſoner then work conſtantly at this work in your houſe?

A. The priſoner never came to my houſe but to work only.

Q. Did he conſtantly work at your houſe?

A. During the eight or nine months that he worked with me, he never abſented himſelf, and I do not recollect giving him leave above once or twice.

Q. What were the whole number of hours in the day which the priſoner during this eight or nine months worked conſtantly at this flower-work?

A. From about nine in the morning, till after one in the afternoon; and after dinner-time till nine at night.

Q. Then during all theſe eight or nine months, from nine in the morning till half paſt one, and again from two till paſt nine, the priſoner at the bar never was in the ſtreets?

A. No, only with the exception of one or two times that I gave him leave to be abſent, he never was in the ſtreets, unleſs it was on commiſſions which I had given him.

Q. Did you uſe often to ſend him out on errands?

A. Not above once or twice in all that time, as I believe.

Q. What time at night did the priſoner quit you?

A. Half after twelve at night.

Q. Did not you look at your watch juſt at the moment the priſoner was going away?

A. I cannot ſay I looked at the watch.

Q. Did you look at the clock?

A. I did not.

Q. Then how durſt you ſwear poſitively that it was half paſt twelve at night when the priſoner quitted you?

Anſwer

A. I only know by the maid looking at the clock, and ſaying that it agreed with the watchman going the hour.

Q. Then at that moment that the priſoner was going out, the maid ſaid ſhe looked at the clock, and that the clock agreed with the watchman, who then cried half paſt twelve?

A. The maid looked at the clock, hearing the watchman cry the half hour, and told me how well the clock went, agreeing with the watchman.

Q. Where ſtands this clock?

A. In the parlour, which you muſt go through to go out of the houſe.

Q. Where was you?

A. In my workſhop.

Q. What is the diſtance between the parlour and the workſhop?

A. A little court between the two rooms, in one of which I was ſeated, in one of which the priſoner was.

Q. Who let the priſoner out at the door?

A. Molly.

Q. Was it Molly that made the obſervation on the time?

A. Yes.

Q. Where did ſhe make the obſervation?

A. I cannot exactly recollect; it was not to me, but to my ſiſter, and my ſiſter reported it to me.

Q. Then you did not hear this girl make the obſervation at all?

A. No.

Q. When did your ſiſter firſt tell you that this obſervation had been made by Molly?

A. It was ſome time afterwards; not at that time, nor that day.

Court. How long afterwards?

A. About a fortnight or three weeks from this time; this maid lived no longer with me, and we called upon her to know if ſhe recollected any thing.

Q. Do you cook your victuals in your own houſe?

A. Yes.

Q. What had you for ſupper that night?

A. I do not recollect.

Q. When did you next ſee the priſoner after that again?

A. He came back to work the next morning.

Q. Do you mean at his uſual hour?

A. He came early the next morning.

Q. How long after the birth-day did he continue to work with you?

A. Till the King's birth-day, the 4th of June.

Q. Who was that Iriſh order from, that you ſpoke of?

A. From a Mr. Crowe, in Ireland; he was here in perſon when he gave that order; there is the written order.

Q. When did you firſt recollect that all this happened on the Queen's birth-day?

A. The priſoner ſent to me to know if I could recollect thoſe circumſtances of that day.

Q. Have you ever in the courſe of your life walked out with the priſoner?

A. Never, unleſs by chance about our buſineſs.

Q. Was you at home laſt night?

A. Yes; but I walked out with a friend, and returned about ſix in the evening to tea.

Q. Does the witneſs know Lord William Gordon's houſe in Piccadily.

A. Yes, I have been there.

Q. Did you happen to paſs that houſe laſt night, or where did you walk laſt night?

A. I did not paſs by that houſe yeſterday: I came from Marybone through Groſvenor-Square, Berkley-Square. I recollect now that I did not go out after the time I returned to tea in the evening. I went through Bond-ſtreet, and ſo ſtrait up to Marybone, then down the fields to the Turnpike, then to Berkley-Square, Groſvenor-Square, and home. I now recollect I went out afterwards to ſettle a bill in Jermyn-ſtreet with a carpenter. I did not find him at home; I then went to Duke-Street, where I met an acquaintance, and converſed with him a ſhort time, and from thence I returned directly home.

Q. Then that was the whole of your walk the ſecond time?

A. Yes.

Q. Then you was not in the Green-Park?

A. I was not.

Q. And all the reſt that you have ſworn to day is juſt as true as the laſt, that you was not in the Green-Park yeſterday evening?

A. Juſt as true.

Q. Then, not being in the Green-Park, I need hardly aſk you whether you accoſted any ladies in the Green-Park yeſterday evening?

A. No, I did not addreſs any ladies in the Green-Park.

Q. Or near Lord William Gordon's houſe *?

* Theſe queſtions were ſuggeſted by the circumſtance of a Lady in Court thinking the witneſs was a perſon who behaved rudely to her the evening *before* in the Green-Park, but as ſhe was not afterwards examined, it is preſumed ſhe diſcovered her miſtake.

A. I was not near that way.

Mr. Knowlys. Is not the Queen's birth day a very particular day for you to notice in the courſe of your buſineſs?

A. Yes.

Q. Have you the leaſt doubt in your own mind that the facts that you relate took place on the Queen's birth-day laſt?

A. I am firmly perſuaded of that.

Q. What is the name of your friend that you took with you?

A. Mr. Jerſo: he is not here; he is at my houſe, to take care of it in my abſence.

Court. Let that witneſs not go out of Court.

Miſs Reine Mitchell ſworn.

Mr. Knowlys *Q.* Was the priſoner employed, in January, by your brother in his buſineſs?

A. He has worked there for about eight or nine months.

Q. How long was he at work there on the Queen's birth-day?

A. He ſtaid till half paſt twelve; for he ſupped with us.

Q. Was he abſent any part of the day from your houſe?

A. He abſented himſelf only at dinner-time, as uſual. He came ſoon after, and worked with me all the day. He did not go out from the time he returned from dinner till half after twelve.

Q. What was his behaviour to you and the ladies who worked there; was it good-natured or not?

A. I cannot but give him the beſt of characters in that reſpect ever ſince the time he worked with us.

Q. Are you perfectly ſure he did not quit the houſe from the time he returned from dinner till half after twelve?

A. I am.

Croſs-examined by Mr. Shepherd.

Q. Was it a cuſtomary thing to work as late as this at your brother's houſe?

A. It is not.

Q. Had they worked often as late as that about that time?

A. For about three weeks we were very much preſſed to work, and had been buſy particularly that day.

Q. But the whole of the three laſt weeks you had worked late, was you not working to complete an Iriſh order?

A. We had a great deal of work for Ireland.

Q. Then you was as much hurried that day as you had been for three weeks before?

A. The ſame.

Q.

Q. Had you the ſame reaſon for working late that day as you had before?

A. About ſix o'clock there came an order from Mrs. Abington.

Q. When did the other two women go away?

A. They went away about half paſt eleven: they did not work on Mrs. Abington's order.

Q. When had you promiſed Mrs. Abington's order to be done?

A. At eight o'clock the next day we promiſed it, but we could not finiſh it till between nine and ten.

Q. What were the names of theſe women?

A. There were two worked, but one was a man and the other a woman, a young girl the daughter of a taylor; one went away at half paſt ten and the other at paſt eleven; the man went away at eleven, and the girl at half paſt ten.

Q. Who came with Mrs. Abington's order?

A. Mr. Jerſo. I was there, and I think my brother was there; he did not give the order to me particularly, I think, it was to my brother.

Q. Did Mr. Jerſo point out the ſort of work to you, or did he ſay what ſort of work it was?

A. He came to us and ſhewed us a pattern that we ſuppoſe he had from Mrs. Abington; he drew a pattern and brought it himſelf in the evening.

Q. Was your brother out that day, or was he hard at work?

A. He was not out all the evening from ſix o'clock when he returned, when we ſet to this work.

Q. About what time did Jerſo come?

A. About ſix o'clock.

Q. Was your brother at home when Jerſo came?

A. He was there and received the order with me.

Q. Name the names of all thoſe that were preſent when Williams went away that night?

A. My brother, myſelf, two women that lodged in the houſe, and a man who came in to fetch work that night before the priſoner left the houſe.

Q. When Williams went away who let him out?

A. One of the maids.

Q. Which of them?

A. We call her Mary; but we do not know her other name?

Q. Did the priſoner work as late as this at any time after that day?

A. He

A. He has worked ſome other days ſince that, but I cannot recollect on what days.

Q. What makes you think it was ſo late as half paſt twelve?

A. Becauſe the maid came in and ſaid, that when ſhe opened the door the watchman went half paſt twelve, and ſhe made a remark that the clock went extremely right, for it agreed with the watchman.

Q. Do you mean that the maid ſtated that at that time?

A. I do not recollect that the maid mentioned the circumſtance at that time, but ſince that time ſhe came and told us of it, and made the remark voluntarily; we ſent to the maid to know if ſhe could recollect the circumſtance, and then it was that the maid ſtated the fact about the watchman and the clock.

Q. How long ago was it?

A. Since the priſoner was apprehended.

Q. Did that maid uſually let the priſoner out at the door when he went away, if he ſtaid late?

A. She did that night; but it is not cuſtomary for her alone to do it. Sometimes her, and ſometimes other people.

Q. Did you ever talk with this maid about theſe circumſtances, till after the priſoner was apprehended?

A. Never, it was impoſſible for her to do it; ſhe did not know any thing about it.

Q. So that ſhe had no other reaſon to obſerve any thing that happened that night more than any other night of the working days?

A. No; all this I have heard ſince he was apprehended.

Court. Did your brother carry on a large trade?

A. Very largely for a great many ladies.

Q. Does he keep any books?

A. Yes.

Q. Do you know who was made debtor for Mrs. Abington's gown; was it Mrs. Abington or Jerſo?

A. Mr. Jerſo.

Q. Are the books here?

A. No, it was delivered to Mr. Jerſo, and he ſtands [illegible] the book.

Court. Let an officer go with Mr. Mitchell for his [illegible] and call on Jerſo and bring him.

Catherine Alman ſworn.

Mr. Knowlys. *Q.* Did you live in January laſt with [illegible] Mitchell?

A. Yes, I live in the houſe.

Q. Was the priſoner at work on the Queen's birth day?

A. He was.

Q. How late did you work?

A. Till near one; I was not out during the courſe of the day.

Q. How long was the priſoner at the bar at work that day?

A. Till half paſt twelve; he was abſent from one till two, that was his uſual time of being abſent.

Q. Now from two, till half paſt twelve, are you able to ſay whether he was abſent or not?

A. He was not.

Q. Are you ſure of that?

A. Poſitively ſure of it.

Q. How do you know it was half paſt twelve?

A. Becauſe my ſiſter related to me in coming along, that when ſhe had opened the door it was half paſt twelve.

Q. From the opportunity you have had of judging of his character, do you think him an ill-natured man, or a good-natured man?

A. A very good-natured man, and a man that is very ſober and attentive.

Croſs-examined by Mr. Piggott.

Q. It was not uſual to work ſo late?

A. No; nine o'clock is the uſual time.

Q. Was the priſoner quite conſtant at his work?

A. Quite conſtant. He worked the uſual hours.

Q. How long have you lived there?

A. Three years.

Q. The priſoner ſupped this night at the houſe, I think you ſay?

A. Yes.

Q. And your ſiſter let him out?

A. Yes.

Q. Only ſince the priſoner was apprehended, did your ſiſter tell this circumſtance, that ſhe heard the watchman call half paſt twelve?

A. No, Sir, I recollect her coming into the room where we had ſupped, and ſhe ſaid to me it is half paſt twelve, and I am afraid it will be too late for Williams to get into his lodgings.

Q. Then your ſiſter had ſome anxiety for Mr. Williams?

A. No further than he mentioned in the courſe of the evening he was afraid the door would be ſhut; on the morn-

ing

ing afterwards he related that the clock ſtruck one when he went into bed. Her fear was ſuch as any body would entertain for a perſon being out, and ſhut out, that is not uſed to be out late?

Q. Will you take upon you, upon your oath, to ſay that the priſoner ever ſince that ſtaid one night till about that hour?

A. O yes, Sir, he has ſtaid ſeveral nights, and later than that if poſſible; but that day having worked particularly, I am perfectly ſure to that day.

Q. How long have you and your ſiſter been acquainted with Williams?

A. Ever ſince October laſt.

Q. Did you ever happen to viſit him at his lodgings?

A. No, Sir, never. He lodged when he came to our houſe at Mr. Williams's, in Duke's-Court; there he lodged on the Queen's birth-day.

Q. Where was you when your ſiſter came in and made this obſervation about the watchman?

A. I was in the workſhop, where we had been ſupping.

Q. Who was with you.

A. Mr. Mitchell, and Miſs Mitchell, and another gentleman, when my ſiſter came in and made this obſervation; ſhe ſpoke to me in Engliſh, therefore they might not know what ſhe ſaid.

Q. The common converſation of the family is in French, is it not?

A. Yes, unleſs we talk by ourſelves.

Q. Had not you been converſing on that evening and all that day in French?

A. Yes; but my ſiſter generally ſpoke to me in Engliſh whenever ſhe ſpoke to me; not one time in a hundred, I can ſay, that ſhe ſpoke French, becauſe ſhe could not ſpeak French then ſo well.

Q. Why you told me you had been ſpeaking French the whole evening?

A. Certainly, Sir, becauſe whenever we all ſpoke we ſpoke in French?

Q. But this obſervation was in Engliſh?

A. Yes, it was.

Q. Now, Miſs Alman, recollect yourſelf upon your oath, when did your ſiſter make this obſervation to you?

A. After ſhe ſhut the door, ſhe came ſtrait from the [illegible] door into the back ſhop where I was, and related the [illegible] I now tell you.

Q. [illegible]

Q. When did you firſt recollect this obſervation of your ſiſter?

A. Never till ſince I heard that Mr. Williams was taken up; one obſervation and another brought them all to my memory; I had no occaſion to recollect it before.

Q. But then you did recollect this obſervation on the watchman?

A. Yes.

Q. Who worked on Mrs. Abington's gown that night?

A. My ſiſter, Mr. Williams, and Mr. Mitchell.

Mary Alman ſworn.

Mr. Knowlys. Where do you live?

A. I lived in January laſt at Mr. Mitchell's, with my ſiſter.

Q. Do you know whether the priſoner lived, or was at Mr. Mitchell's houſe on the Queen's birth-day?

A. Yes, I do; he worked there all day.

Q. Can you ſay how long he ſtaid on that day?

A. Till half paſt twelve at night.

Q. How do you know that it was ſo late as half paſt twelve when he quitted the houſe?

A. Becauſe I looked at the clock, and I heard the watchman go as I let him out.

Q. If he had been abſent half an hour, or an hour, muſt you have obſerved it?

A. Yes, I muſt, becauſe I had been ſitting with him the whole time.

Croſs-examined by Mr. Shepherd.

Q. Had you lived there a fortnight before this time?

A. Yes; a fortnight or a month.

Q. During that time, had the priſoner ſtaid ſo long after his working-hours at any time?

A. Yes, ſometimes he did, but not very late; I look upon that to be the lateſt night he ever ſtaid.

Q. You let Mr. Williams out?

A. Yes.

Q. How came you to look at the clock?

A. He aſked me what o'clock it was, and I looked at it to tell him.

Q. Pray was he going through the ſame room as you was?

A. Yes.

Q. Had you a candle?

A. Yes.

Q. Why could not he look himſelf?

A. He told me to look, and I looked; and I let him out and came back again into the ſhop.

Q. Did you tell your ſiſter when ſhe applied to you to recollect theſe circumſtances, that you had looked at the clock to tell Mr. Williams what o'clock it was?

A. Yes.

Q. How many times had you worked late during the time you had been there?

A. We had not worked late before, while I was there.

Q. How came you to be in a hurry?

A. About this dreſs.

Q. And ſo they ſet you about this dreſs, who had never worked before?

Mr. Knowlys. If I underſtand your ſituation right, you were the perſon employed to do the houſhold work?

A. Yes, I was.

Mr. Shepherd. How long had you known Williams before?

A. I do not know how long, only while I lived at Mr. Mitchell's.

Q. Had you any particular anxiety about his conduct that night?

A. No, Sir.

Q. You had not ſaid that you was afraid he would be too late at his lodgings?

A. No.

Mr. Knowlys. Had he expreſſed that fear to you?

A. He had.

Frances Bowfield ſworn.

Q. Was you at work at Mr. Mitchell's on the Queen's birth-day?

A. Yes.

Q. Was the priſoner there on that day?

A. Yes.

Q. Was he at work?

A. Yes.

Q. Till what time did you work there yourſelf?

A. Till half an hour paſt eleven.

Q. Are you ſure it was half paſt eleven?

A. Yes.

Q. How do you know?

A. Becauſe I aſked the watchman when I went home, and he ſaid it was half an hour paſt eleven.

Q. Where is your home?

A. In Coventry-Court; one end of it comes into Coventry-Street, and the other into the Haymarket.

Q. Had you obſerved the priſoner working there that day?

A. Yes.

Q. Were you working in the ſame room with him?

A. Yes.

Q. Was he at Mr. Mitchell's, in the ſame room, when you left it?

A. Yes.

Q. Had he been working from dinner time?

A. Yes.

Q. Did you leave him there?

A. Yes.

Q. Was the cloth laid when you left them?

A. It was going to be laid; it was not laid.

Typhone Fournier ſworn.

Mr. Knowlys. Did you work for Mr. Mitchell in January laſt?

A. Yes.

Q. Do you recollect the Queen's birth-day, and was you at work then?

A. Yes.

Q. Do you know the priſoner, whether he worked at Mr. Mitchell's houſe that day?

A. Yes.

Q. How long did you work at Mr. Mitchell's houſe that day?

A. Till eleven o'clock.

Q. Did you ſee the the priſoner there, and how long was he there while you was at work?

A. I left him at work there.

Mitchell returned with the books, and Mr. Jerſo.

——— *Jerſo ſworn.*

Mr. Knowlys. *Q.* You had dealings with Mr. Mitchell?

A. Yes.

Q. Did you call upon him on the Queen's birth day?

A. Yes.

Q. Did you give him any order then, and what order?

A. Yes, an order for a trimming for Mrs. Abington.

Q. Are you ſure that order was given on the Queen's birth-day!

A. Yes, I am ſure of it; I drew the pattern at Mr. Mitchell's houſe that very day.

Q. What made you recollect it?

A. I remember it, becauſe the ſtreets were quite illuminated.

Q. What time was it?

A. It was later than ſeven. I carried the pattern about ſeven, and I brought the order to Mr. Mitchell after; it was very near eight when I gave the order.

Q. Did they begin to work upon it directly?

A. I do not know; I went away immediately when I gave the order; I did not look at the work, I ſaid it was neceſſary to have four yards the next morning about twelve, and the remainder in the afternoon; but the next morning I received eight yards about nine or ten.

Q. Did you ſee Mitchell himſelf?

A. No, he was out when I drew the pattern; it was about ſeven.

Q. When you went the ſecond time, which was about eight did you ſee him then?

A. I do not recollect at all whether he was at home when I came back; I cannot ſay whether he was or was not.

Q. Then you do not recollect whether you ſaw Mitchell at all about this?

A. No, I do not know whether I gave the order to Mr. Mitchell or Miſs Mitchell, but whomſoever I did give it to it was about eight at night.

Court. Are you ſure of the quantity?

A. It was eight yards.

Q. Look at your own book; explain to us what the entry means?

A. When I carried the trimming to Mrs. Abington, ſhe ſaid ſhe wanted only ſix yards, and I was obliged to keep the other two yards, and ſhe took it two months after.

Q. Did not ſhe want this for the Queen's birth-day?

A. No, the next day.

Q. What is the whole ſum charged in your book?

A. Eighteen ſhillings a yard, for ſix yards 5*l.* 8*s.*

Court. You dealt with him for a great many other articles, did you not?

A. Yes.

Mr. Piggott. *Q.* Do you live at the houſe?

A. No, I married a ſiſter of Mr. Mitchell's, and the priſoner has come two or three times to my houſe.

Sarah Brady ſworn.

I worked in Mr. Mitchell's houſe; I have known the priſoner ſix months.

Mr. Knowlys. Q. What has been his character for good-nature?

A. Very good-natured.

Q. Did you ever perceive any inſtance of a ſpiteful diſpoſition?

A. No; quite the contrary.

Sophia Cameron ſworn.

I have known the priſoner eight years; but I have worked with him five months.

Q. During all the time you have known him, what has been his character for good-nature?

A. Truly good-natured.

Q. Did you ever ſee any thing of him ſpiteful or ill-tempered?

A. Quite the reverſe.

——— *Terry ſworn.*

I am in the Navy-Office; I have known the priſoner from about Michaelmas, 1786, to the preſent time.

Q. What character has he borne for humanity and good-nature all the time?

A. The moſt amiable character for good-nature, amiable behaviour, and politeneſs.

Q. How long has he quitted Mr. Gallini?

A. I believe he quitted him before I knew him; he uſed to come to help his ſiſter to make flowers; he had no other buſineſs that I know of; I believe he uſed to aſſiſt Mr. Gallini in teaching at ſome boarding-ſchools.

Thomas Williams ſworn.

I deal in china, in St. James's-ſtreet; the priſoner is no relation; I have known him near ſix years.

Mr. Knowlys. Q. During that time, what has been his character for good-nature?

A. Very good natured; he liked the ladies too well; and I was aſtoniſhed when I heard he was the man; I thought his character very good.

Sarah

Sarah Seward ſworn.

I live at the ſeven dials; I have known him four years.

Q. What has been his character for humanity and good-nature?

A. His character—when I firſt knew that young man, I was exceedingly ill: I never knew him any thing but an honeſt young man; and his behaviour to me was manly, and a credit to any man, for he ſaved my life.

The priſoner likewiſe called nine other witneſſes, who all gave him a very good character for humanity and good-nature.

CHARGE.

Mr. JUSTICE BULLER.—Gentlemen of the Jury, to imagine or ſuppoſe that any body in this crowded audience, ſhould not have heard of the great many very ſerious and atrocious injuries which have been done to ladies in the neighbourhood of this place, would be abſurd: the priſoner, in his defence, has taken it for granted, that every body here muſt have heard what outrages either have been committed, or at leaſt are ſuppoſed to have been ſo; and therefore he has very rightly addreſſed himſelf in his defence, not only to your paſſions and your feelings, but to your juſtice; for he has told you that popular prejudice has prevailed much againſt him; and therefore he requeſted from your juſtice; that you will hear and conſider his caſe with patience and attention, before you pronounce your opinions on him: it is but common juſtice you ſhould do ſo, for popular prejudice often injures, but it never ſerves the cauſe of juſtice; and therefore I am ſure that you in the opinions which you may form on this caſe, will totally lay aſide every thing that you may have heard before you came into this Court, and conſider the caſe coolly and diſpaſſionately on the evidence that has been given: in this, as well as in all criminal caſes, indeed I ſhould ſay criminal and civil, you will have only to conſider what are the truths of the facts that are alledged; and in order to bring the caſe to as narrow a compaſs as I can, for your own conſideration, I will tell you what appear to me to be the material points for you to diſcuſs: if after conſidering the whole of the caſe, you ſhould be of opinion that the facts are made out againſt the priſoner, ſtill I ſhall reſerve his caſe for the conſideration of all the Judges of England, on two grounds; firſt, becauſe this undoubtedly is the firſt proſecution that has ever taken place on the ſtatute on which he was indicted; and

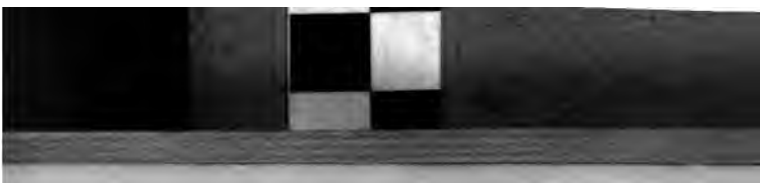
though I cannot profeſs to entertain the ſmalleſt doubt in my own mind, what is the ſure conſtruction of that Act of Parliament; yet being a new caſe, I think it is right that the opinion of all the Judges of England ſhould be known: another point in which, in caſe of conviction, I ſhall ſave the caſe for the opinion of the Judges is, that at preſent I do entertain ſome doubts about the form and ſufficiency of the indictment *; but theſe are queſtions which it is not neceſſary now to agitate. The ſtatute is an act paſſed in the 6th of *Geo.* I. the words of the act are "That if any perſon ſhall wilfully and maliciouſly aſſault another in the publick ſtreets or high ways with intent to tear, ſpoil, cut, tear, burn, or deface, and ſhall tear, ſpoil, cut, burn or deface the garments or cloaths of ſuch perſon, every perſon ſo offending being thereof convicted, ſhall be adjudged to be convicted of felony:" now on this ſtatute you obſerve, Gentlemen, that it is neceſſary that the aſſault ſhould be committed in the ſtreets or highways, that it ſhould be made wilfully and maliciouſly, and alſo with intent to cut or ſpoil the cloaths, and it likewiſe requires that the cloaths ſhould in fact be ſo cut or ſpoiled; now before I ſtate to you the particulars that have been given in evidence, perhaps one might aſſume it as pretty clear that ſome perſon did aſſault Ann Porter, who is the perſon that ſtood forward as the proſecutrix, in the ſtreet, and did give her a blow, which not only cut her cloathes, but cut her perſon alſo; then the two points that are moſt material for your conſideration are, firſt, whether that perſon, be he whom he might that made the aſſault on her, did it wilfully and maliciouſly with an intent to cut her cloaths; becauſe I take it to be very clear that where the intent is a material ingredient in the conſtitution of the crime, that intent is a matter of fact, and not a matter of law; an intent, therefore, being matter of fact, muſt be brought before the Jury. Gentlemen, the next queſtion for your conſideration will be, (if you ſhall be ſatisfied that the perſon, be he whom he might, that thus accoſted Miſs Porter, and gave her the blow ſhe deſcribed, did it with intent to cut her cloaths, as well as to cut her perſon,) whether that man was the priſoner at the bar. Theſe I think are the two leading points for your conſideration. Ann Porter tells you, &c. *Here the learned Judge ſummed up the evidence on the part of the proſecution; and then added,*) Gentlemen, this is the whole of the evidence, on

* *The doubt reſpecting the indictment is ſuppoſed to be, that the* cutting *is not expreſsly ſtated to be* at the preciſe time *that the aſſault was made.* the



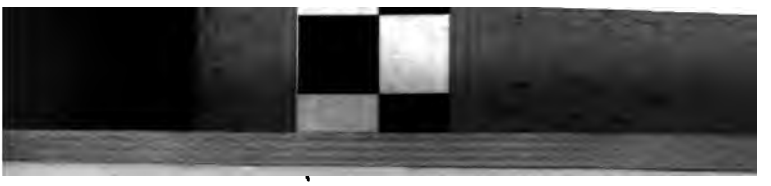
the part of the profecution: firſt, you find that the four young ladies have all ſworn very poſitively to the perſon of the priſoner; you will naturally examine what opportunities they had of knowing the priſoner; and whether they were likely to be miſtaken; as I mentioned to you in ſumming up the evidence, they had ſeen the priſoner ſeveral times before, and in the day-time; and the manner in which they had ſeen him, certainly called upon them to pay particular attention to his perſon; and thoſe who were at the Ball-room, ſwear equally poſitive that he was the man; they ſaw him that night, and they have ſeen him three times ſince; and upon no occaſion did they entertain the ſmalleſt doubt; but when they ſaw him in St. James's Park, in conſequence of what they ſaid he was apprehended, then the ſaid moſt poſitively that he was the perſon, and challenged him likewiſe at their houſe.

Gentlemen, there are two or three other circumſtances that are neceſſary to be taken into conſideration with reſpect to the fact whether they are accurate or miſtaken as to his perſon; firſt, what it was that paſſed when the priſoner or the man, whoever it was, met them at the bottom of St. James's-Street, the ſiſter ſays the priſoner turned round and ſtared at her, and made uſe of this expreſſion, Oh, ho! and immediately gave her a violent blow on the back of the head; now be the man whom he might, the perſon that ſtopt and looked at Miſs Sarah Porter at that time, and afterwards gave the wound to Miſs Ann Porter, made uſe of that expreſſion: what is to be collected from it? Is it the expreſſion of a man who was a total ſtranger and had never ſeen their faces before? Is it the expreſſion that an intimate friend or acquaintance would uſe, or is it more likely to be the expreſſion of ſome man who had ſeen them before, and between whom ſomething or other had paſſed that was not ſo agreeable? The man who had formerly inſulted them, might uſe ſuch an expreſſion. But why ſhould any man do it that had never ſeen her before; that he was an acquaintance of theirs there is no reaſon or pretence for ſuppoſing; but they ſay they have ſeen him often before; if the man had never ſeen either of them before, the expreſſion does ſeem to be very unaccountable. The next thing, Gentlemen, to be conſidered, is the conduct of the priſoner himſelf when challenged in St. James's Park? Coleman purſued him in conſequence of what Ann Porter had ſaid, the priſoner walked on pretty faſt, and he led him from place to place at pretty conſiderable diſtances; did he or did he not perceive he was purſued by Coleman? If you ima-



gine he did not, it takes off a great deal from the weight of the evidence; but Coleman tells you he is poſitive, ſo early as when they got down to the Admiralty, the priſoner muſt perceive he was purſued by him, how comes it then that nothing is ſaid by the priſoner, that he ſhould go from place to place till he goes to one place where he ſtaid about five minutes, and Coleman had endeavoured to affront him in every way; and notwithſtanding that, the priſoner takes no notice of it. The next thing that ariſes is, what paſſed when they went down St. James's-Street; he tells you the priſoner, when they croſſed the way, ſaid, This is Mr. Porter's! Now I do not ſee how this affords any inference either way; becauſe if the priſoner had lived in London and ſaw Coleman croſs, he might uſe ſuch an expreſſion, and mean nothing; however, the priſoner is conducted into the parlour, and what paſſed there will be alſo material for your conſideration; for, according to the evidence of Mr. Coleman, a more diſtreſsful or melancholy ſcene could hardly be exhibited; two young ladies fell into fits, and fainted away; one exclaimed, That was the Wretch! What is the priſoner's behaviour at that time? Why his obſervation to Coleman is, "The ladies behaviour is extremely odd! They do not take me for the perſon advertiſed!" he is told pointedly, "Yes, they do." Now in that ſcene, ſhould you expect from an innocent man that he ſhould preſerve a total ſilence, or endeavour to give ſome explanation of himſelf, or refer to ſomebody to give ſome account of him? but Coleman ſays he does not recollect any anſwer that he gave; if he gave no anſwer, it will be for you to ſay what inference is to be drawn from a man being totally ſilent when he ſaw ſuch a ſcene of diſtreſs, and was told he was charged as doing this injury: did he appear embarraſſed? No, ſays Coleman, he did not; he ſaid the ladies were under prejudices; but did he ſhew any ſenſe of guilt or innocence? What is his general deportment? Why, ſays he, that I cannot tell; it depends on people's nerves and feelings; ſome men may be baſhful; others very confident and impudent; but when he ſaw theſe two young ladies, his applying the circumſtances of it to himſelf, by ſaying, They do not ſuſpect I am the perſon advertiſed; and being told they did, he ſays nothing, or ſomething ſo immaterial, that Coleman cannot recollect any one word he ſaid: theſe are circumſtances ariſing from the priſoner's conduct, that undoubtedly give great credit to the poſitive oaths of the four Miſs Porters, who have ſworn moſt decidedly as to his perſon; they, you obſerve, ſpeak of him at different times; they ſpeak of him as having a moſt perfect know-

knowledge of his perſon before this fact happened; they are equally ſure of him at the time the fact did happen, and alſo at the three periods when they ſaw him afterwards. Now, let us ſee how the evidence correſponds, and, comparing one time with another, could they, or is it probable that they might, be miſtaken as to this being the perſon whom they had ſeen four times previous to the day or the night when this injury was done to Miſs Ann Porter? They had ſeen him by day; they had obſerved his perſon; they had agreed the moment they ſaw him again, in ſaying it was the ſame man. If they are accurate in that reſpect, and have proved to your ſatisfaction, that the perſon they ſaw four times before, was the ſame perſon they ſaw three times after, their evidence goes the length of ſhewing that this man was the perſon whom they had ſeen at the four different periods that they ſpeak of previous to the time of the injury. The ſtreet was very light; the houſe was very light; they had full opportunities of ſeeing his perſon, becauſe he was cloſe to them, and they ſwear that they knew him immediately; this ſtrongly imports that the man, whoever he was, was not unknown to them. Gentlemen, ſo ſtands the evidence on the caſe on the part of the proſecution. For the priſoner, you have had a great number of witneſſes called, ſeven of whom are for the purpoſe of proving that this priſoner could not be the man, but that the Miſs Porters are miſtaken; becauſe the priſoner, on that night when the offence was committed, was in another place, namely, at Mr. Mitchell's houſe: and Mr. Mitchell himſelf tells you, &c. *(repeating Mitchell's evidence)*. This ſeems to be obvious from the evidence of Mitchell, that he never recollected, or, in fact, knew many of the circumſtances which he has deſcribed to you, till within a fortnight or three weeks from this time; to be ſure this is a very looſe way of making up his mind as to the recollection of a fact which had paſſed at the diſtance of pretty nearly ſix months. You will find, as I ſtate to you the other evidence, that there are many circumſtances in which this witneſs is contradicted, and in which the other witneſſes have contradicted themſelves; but what effect that ought to have, or may have on your minds, is for you alone to decide. It is not in every little circumſtance, in which witneſſes differ who ſpeak of the ſame tranſaction, that by differing they deſtroy the credit of each other; but the queſtion is, whether the facts in which you find they differ, are ſo material, and ſo pointed, ſo much within the knowledge of each witneſs, that if they told you the truth, and ſpoke accurately on what paſſed they could not vary



ſo much. (*Here his Lordſhip ſummed up the reſt of the evidence on the part of the priſoner.*)—Gentlemen, this is the whole of the evidence. It is for you to ſay whether you give any, and what credit to this alibi; and whether it is proved in a manner that ſatisfies you, that the four Miſs Porters, confirmed as they are by the circumſtances, are miſtaken as to the priſoner. In the firſt place, it is natural to examine, what was there on the night of the Queen's birth-day that called on theſe people to take particular notice of what paſſed then, more than any other night? It is admitted by them, one and all, that they never thought about it, nor converſed about it, till after the priſoner was taken; but that ſeems to me not to diſcredit them. Why ſhould they do it? for, according to their own account, there was nothing to call them to it. After the priſoner was taken up, they endeavoured to refreſh their memories, and bring to their recollection what paſſed on this particular day. Now, in doing that, they certainly varied very much in the accounts they have given; and, at laſt, is there any thing that calls on them peculiarly to fix on the Queen's birth-day as the night when the priſoner remained at Mitchell's houſe till half paſt twelve, and ſupped with them? Was it a peculiar thing that the priſoner ſupped with Mitchell? Mitchell tells you no; that was not ſo; becauſe whenever he ſtaid there after the uſual hour of work, he uſed to ſup there. What is there then that calls upon them to fix with any degree of certainty in the month of July, whether the night in which the priſoner ſupped with Mitchell, and ſtaid till half paſt twelve, was on the 18th of January, or any other day? That he might have ſupped there ſome night, may be very true; that in the courſe of that day Mr. Jerſo was there, and did give an order for Mrs. Abington's gown, might be very true; but it does not follow from thence, that this was the night in which the priſoner ſupped there; and when we bring the caſe to that point, to be ſure the very contradictions that are in the teſtimony, are extremely material, particularly in endeavouring to fix the time; Mitchell and his ſiſter have no other line to go by, but what one ſervant tells them another ſervant told her; and theſe two ſiſters directly contradicting one another. Gentlemen, it is for you to ſay which ſide you give credit to; if you believe the witneſſes, on the part of the priſoner, and that he continued in Mitchell's houſe, from two or three that afternoon, till half after twelve, he could not be the perſon that committed this injury; and of courſe you will acquit him: if, on the other hand, you are ſatisfied from the



the teſtimony, the very poſitive teſtimony, of the four Miſs Porters, that he was the man, and that they knew his perſon ſo well before, that they could not be miſtaken; if you ſee from his conduct, at the time he was brought back, and in the moment he ſpoke to Miſs Sarah Porter, that he was the man; if you believe this evidence, when put together, you muſt give the effect to it, and pronounce that the priſoner was the man: if you are of that opinion, the only queſtion that remains then is, what was his intent? If his intent was to cut both the cloaths and the perſon, I cannot ſay I entertain the ſmalleſt difficulty myſelf, but that the caſe will fall directly within the Act of Parliament. Many caſes may be figured, in which cloaths may be cut, and yet it would not be an offence within this ſtatute; for if the object was clearly different, and in the courſe of a ſcuffle the cloaths were cut, I ſhould ſay it was not within this ſtatute; firſt, becauſe it was not part of the original deſign it does not come within the words "wilfully and maliciouſly aſſaulting, with intent to cut;" and in the next place, becauſe it appears that the object was different; but if the intention was to do both, as it ſeems to me, the queſtion could admit of no doubt: and there is a third caſe, which would be equally clear as to the conſtruction of the Act; that is, ſuppoſing that the priſoner meant to cut her perſon; whether in that deſign he did not alſo intend to cut her cloaths: in conſidering that queſtion, it is material to attend to the manner in which he accoſted Miſs Porter, the inſtrument he uſed, and the place to which he aimed the blow; the inſtrument muſt have been very long, and very ſharp; and the witneſſes ſay the cloaths are extremely torn; it is not like a pointed inſtrument, calculated to injure the perſon only, but it has rent her cloaths; and if he made the blow in ſuch a way that he could not ſtrike her perſon, without cutting her cloaths, then the queſtion will be, whether he who intends the end, does not alſo intend the means; ſo it goes on the queſtion, as intention: therefore I can only leave the caſe, on both points, for your conſideration; it is for you alone to diſcuſs, and pronounce the priſoner, GUILTY or INNOCENT; as you ſhall judge the truth of the caſe to be.

The Jury immediately pronounced a verdict, GUILTY.

Court. Let the ſentence be reſpited till December Seſſions; and all the witneſſes, who are bound over on the other proſecutions, their recognizance muſt be reſpited till that time.

The proſecution of RENWICK WILLIAMS, upon the ſtat. 6 Geo. I. cap. 23, § 11, which makes it felony to aſſault any perſon with intent to cut or ſpoil his CLOATHS, when his obvious purpoſe was to cut and wound the PERSON, being founded on the authority of the following Caſe, a full ſtatement of that Caſe cannot be unacceptable to our readers, eſpecially as a difference of opinion is ſuppoſed to exiſt among the Judges upon the propriety of *Williams's* proſecution on this ſtatute.

Caſe of ARUNDEL COKE, Eſq.

Arundel Coke, Eſq. of Bury St. Edmunds, was indicted at the Suffolk Aſſizes, before Lord Chief Juſtice *Pratt*, March 13, 1721, together with John Woodburne, upon the *Coventry Act*, 22, 23 *Ch.* II. for aſſaulting and ſlitting the noſe of Edward Criſpe, Gent. with an *intent him to maim and diſfigure*.

It appeared on the trial, that Coke who was brother-in-law to Criſpe, and was intituled to an eſtate upon his death, procured Woodburne to murder him, and himſelf lay in wait, aiding and abetting: and that Mr. Criſpe was terribly wounded with a hedge-bill, his noſtril cut through, and left for dead; but he afterwards recovered. Coke had the effrontery to reſt his defence upon this point, that the aſſault was not with an intent to diſfigure, but with an intent to murder. The proceedings upon which we ſhall give at large, as they occurred on the trial.

Mr. *Coke*. My Lord, I am very ſenſible that a point of law may ariſe on the ſtatute whereon I am indicted.

Ld. Ch. Juſtice. Whereon?

Coke. With reſpect to my intention.

Ld. Ch. Juſtice. Your intention is matter of fact, and muſt be tried by the Jury, whether your intent was to maim and diſfigure; this doth not ſeem to me to be a point of law; if there be any point of law that ſhall ariſe, you ſhall have Counſel to ſpeak to it; but whether you ſlit Mr. Criſpe's noſe, with an intention to diſfigure him, is a matter of fact.

Coke. My intent was to kill Mr. Criſpe, and not to maim or diſfigure him.

Ld. Ch. Juſtice. But that is the queſtion the Jury are to try, Whether you did not of malice ſlit his noſe, with an in-

intent to disfigure him. If the Jury do not find that you ſo did, you muſt be acquitted on this indictment. Suppoſing your deſign was to kill, yet your deſign might be likewiſe to maim; and this the Jury muſt try; this is a matter of fact for their conſideration.

Coke. This is a very penal ſtatute, and I am unable to plead my own cauſe; I beg your Lordſhip to aſſign me counſel.

Ld. Ch. Juſtice. If any point of law doth ariſe upon the ſtatute, you ſhall have counſel; but as yet there is nothing but matter of fact; whether the fact proved doth ſupport the charge in the indictment; or, in other words, whether the evidence be ſufficient to make good the charge; this muſt be left to the Jury; I will ſtate the fact to them, and they are on their oaths to give in their verdict.

Coke. This is a very penal ſtatute, and I cannot argue it for myſelf; I hope your Lordſhip will aſſign me counſel; this is the firſt indictment that ever was upon this ſtatute.

Ld. Ch Juſtice. What do the King's Counſel ſay to it?

Serj. Selby. After ſo full an anſwer as your Lordſhip has given, I think it but vain to ſay any thing; I always thought that no matter of law could ariſe upon this fact and indictment; for Woodburne did the fact of malice forethought, by lying in wait, and with an intention to maim; Mr. Coke was aiding, abetting, and privy to the fact: therefore, though it was an intent to kill, it muſt be to maim alſo; he could not intend to kill him with ſuch an inſtrument, without intending to maim him firſt; and therefore, if there were two intentions and but one executed, there is no pretence to ſay, that what was executed was not intended. Mr. Coke ſays, there never was any indictment before upon this ſtatute; if not, it muſt be becauſe no man before ever thought of being guilty of ſo horrid an action.

Ld. Ch. Juſtice. If any point in law doth ariſe, you ſhall have counſel; but the fact muſt be agreed and ſtated, before the law can come in debate. You ſay, your intent was only to murder; but that is not yet agreed or found to be fact: it is the point now in trial, whether you did it not with an intention to maim or diſfigure; and according as that intention ſhall appear to the Jury, ſo will they either acquit or convict you; therefore if you have any thing more to ſay I deſire you to go on.

Coke. I ſubmit to your Lordſhip's judgment.

Ld. Ch. Juſtice. Gentlemen of the Jury, this is an indictment of the priſoners at the bar, John Woodburne and Arundel Coke, for felony, by lying in wait, and purpoſely

and maliciouſly ſlitting the noſe of Edward Criſpe, with intention, in ſo doing, to maim or diſfigure the ſaid Edward Criſpe. John Woodburne is indicted for the principal actor, or the perſon who did the fact; and Arundel Coke is indicted for being preſent, aiding and abetting. This indictment is founded on a ſtatute made in the two and twentieth year of King Charles the ſecond, intituled, "*An act to prevent malicious maiming and wounding*;" whereby it is enacted, That if any perſon or perſons, from and after the twenty-fourth day of June, in the year of our Lord 1671, on purpoſe, and of malice forethought, and by lying in wait, ſhould unlawfully cut out, or diſable the tongue, put out an eye, ſlit the noſe, cut off a noſe or lip, or diſable any limb or member of any ſubject of his majeſty, with intention in ſo doing to maim or diſfigure, in any the manners beforementioned, ſuch his majeſty's ſubject, that then, and in every ſuch caſe, the perſon or perſons ſo offending, their counſellors, aiders, and abettors (knowing of, and privy to the offence, as aforeſaid,) ſhall be, and are thereby declared to be felons, and ſhall ſuffer as in caſes of felony, without benefit of the clergy. Now the queſtion on this indictment is, whether John Woodbourne did on purpoſe, and of malice forethought, and by lying in wait, unlawfully ſlit the noſe of Edward Criſpe, with an intention to maim or diſfigure him therein? And, whether Arundel Coke was feloniouſly preſent at the fact, aiding and abetting Woodbourne in the commiſſion and perpetration of it? To make out this matter, ſeveral witneſſes have been called; the firſt witneſs was Edward Criſpe himſelf, who informs you, that Arundel Coke married his ſiſter, and Mr. Brown, Coke's ſiſter; and that laſt New-years-day they were invited to ſup at Mr. Coke's; and that before ſupper Mr. Coke propoſed to go to Mrs, Monke's; and that after ſupper, about ten o'clock at night, Mr. Coke called Mr. Criſpe out of the parlour to go to this Mrs. Monke's; and that when they had walked three or four turns before the houſe where Mrs. Monke dwelt, Coke ſtood ſtill, and made a noiſe like a hollowing, which made Mr. Criſpe afraid, being dark, ſo he made toward the wall; but in a quarter of a minute's time a man came and knocked him down: who that man was, nor what was then further done to him, he could not then tell, becauſe by the blow he loſt his ſenſes for ſome time; but afterwards he got up again, and returned to Mr. Coke's houſe from whence he came, but in a ſad condition, much wounded and bloody, where Mr. Sturgeon the ſurgeon came to him, from whom you have the particulars of his caſe. He ſays, that Coke *was cloſe by him* when he was knocked down; but did not hear



hear Coke ſay any thing. He alſo ſays, that upon his death one hundred pounds *per annum* would have gone to Coke's wife, as one of his ſiſters and co-heir.

The next witneſs is Mr. Brown, who married Coke's ſiſter; and he ſays, that he, his wife and daughter were invited to ſup at Mr. Coke's the evening of New-years-day; that he came about ſix o'clock, and found Mr. Coke and Mr. Criſpe drinking a glaſs of wine in the parlour before ſupper; that he ſate down and drank with them till ſupper; that after ſupper they three came into the parlour again, and ſome time after Coke went out of the room, and then came back again, and called Mr. Criſpe out of the room, who followed him; that Coke returned again in about ten minutes, and ſeemed to be out of breath, as if he had been walking faſter than ordinary; that Coke's houſe is diſtant from the churchyard about twice the length of the ſhire-houſe; that Coke, after he came in, drank a glaſs of wine; and that Brown aſked Coke what was become of Mr. Criſpe; and that Coke ſaid, he believed he was gone home in the dark; and that in about two or three minutes after Mr. Criſpe came in much wounded and bloody; and that it was about half an hour between the time of Mr. Criſpe's going out and returning again.

Mr. Sturgeon the ſurgeon ſwears, that being ſent for, he came to Mr. Criſpe about eleven o'clock that night; that he had loſt a good deal of blood, and was very much wounded; and that in the whole he had received ſeven diſtinct wounds, which he apprehends were by ſo many ſeveral blows. He hath given you a particular deſcription of the ſeveral wounds; the ſecond wound is that which is alledged to be within this ſtatute. He tells you, that this wound divided the right ſide of the noſtril; and that though the edge of the noſe was cut through, yet it was cut through in another place; the noſe was ſlit; there was cut from without into the noſtril; indeed the ſlit was not very great, for he ſewed it up with one ſtitch; but he is ſure that a ſlit there was, and you have ſeen Mr. Criſpe's noſe. Now the ſlitting of the noſe is one of the particular facts mentioned in the ſtatute.

Mr. Willet the conſtable ſwears, that he was with Woodburne after his commitment, and that he told him, he was concerned in the wounding Mr. Criſpe; that he had been there waiting for that purpoſe; and that when Coke whiſtled to him, he went up and made the aſſault upon Mr. Criſpe with an hook or bill, that was new ground for that purpoſe, and directed him where to find it at his houſe, which he accordingly did, and brought it to Woodall.

ſaid that was the book; and the hook hath been now produced before you; and you have ſeen it.

The next witneſs is Mr. Wetherell the gaoler, who ſwears, that the day after Coke was committed to his cuſtody, Coke ſent him up into his chamber, and told him, that he and Woodburne had had a deſign to murder Mr. Criſpe, and had attempted it ſeveral times, and deſired him to go and ſecure Woodburne, which he accordingly did. He hath given you an account how and in what manner he ſecured him; and he ſwears moreover, that Coke told him ſeveral times that he had a deſign to murder Criſpe, and that he employed Woodburne, and delivered Criſpe into his hands; that Woodburne did it with an hook, and that he bid Woodburne to cut his windpipe? and that if Woodburne had not been a cow-hearted dog, he would have ſoon done, and ſecured Criſpe from telling tales. Wetherell likewiſe ſwears, that Coke told him, that he called Criſpe out of his houſe, went into the churchyard with him, and there delivered him into Woodburne's hands; and he farther ſwears, as to Woodburne, that Woodburne owned that he and Coke had lain in wait ſeveral times, and at ſeveral places, to murder Mr. Criſpe; and as to this particular fact, he gave him this account, that he ſtruck him a blow with his hook, and that not quite ſtriking him down, he gave him a ſecond blow; and that as Criſpe was falling, he cried out, God damn him; and that then it grieved him to kill a man with an oath in his mouth.

Robert Moon ſwears, That when he heard what was befallen Mr. Criſpe, he ſaid, that he knew the perſon that did the fact, or him who employed the perſon; and the reaſon was, becauſe about three years and a half before Mr. Coke ſent for him, and told him, that he wiſhed Mr. Criſpe out of the world, and that ſomebody would knock him on the head; and that when he aſked him what advantage that would be to him? he replied, a very good eſtate; and afterwards told him, he did not value ten or twenty guineas to knock him in the head: this made Moon reflect upon himſelf, and was concerned that he ſhould have ſuch an opinion of him, and thereon told him, that he would not kill the greateſt villain in the world for ten ſuch towns as Bury.

John Carter ſwears, that on Friday before New-year's-day laſt, Coke ſent Woodburne to him, to tell him that his maſter Coke wanted to ſpeak with him; that thereon he went to his houſe, and was ordered to come up to him in his chamber, which he did; and there Coke firſt enquired, whe-

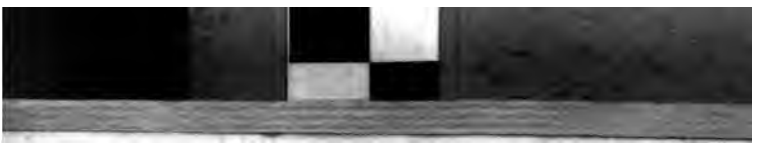


whether he could help him to a good ſtrong horſe? And then told him, that he heard he had loſt much of his buſineſs, he had no iron, nor coal; and that he had a thing in agitation that would make a man of him as long as he lived; and thereon aſked him, whether he could keep a ſecret, and one of the biggeſt ſecrets in the world? And upon his telling him that he could, he aſked him whether he could cut five or ſix mens heads off without ſcruple of conſcience? And when he told him that that was too much for a man's conſcience to bear, he told him, there were thoſe above, meaning the South-Sea gentlemen, who had done ten times worſe, ruined families, and beggared gentlemen; and that to cut mens heads off was but a trifle to them. That hereon Carter told him, he believed he ſpoke only in joke, and by way of merriment; but Coke aſked him, whether he thought he ſent for him only by way of joke? And then aſked him, whether he could cut off one man's head without ſcruple of conſcience? And when Carter told him, no; then Coke told him, if he could not cut off a man's head, and lay it down on the table before him, he was not for his turn; and then gave him a glaſs of brandy, and bid him conſider of it for a day or two, and if he could cut off a man's head without ſcruple of conſcience, he ſhould have plenty of gold and ſilver, and any thing elſe he ſhould aſk: whereto Carter replying, that he needed no conſideration, he could not do it: then he bid him ſend Woodburne to him, which he did.

In all this diſcourſe between Carter and Coke, I do not find that Criſpe was the perſon named on whom this outrage ſhould be committed: but Carter, who is a tenant of a houſe of Mr. Criſpe's, ſays, that Coke told him he heard the houſe was out of repair: that it would be his after Mr. Criſpe; and aſked him, whether he would not like it better for Coke to keep it in repair, as he had done before, whilſt he was Criſpe's ſteward?

This is the ſubſtance of the evidence given againſt the priſoners at the bar, to prove that they maliciouſly, and by lying in wait, have ſlit Mr. Criſpe's noſe, with an intent to diſfigure him therein.

Woodburne doth not deny the general fact, that is, the deſigned lying in wait to aſſault Mr. Criſpe, nor the cutting or knocking him down with his hook; his confeſſion is not evidence againſt Coke, but it is againſt himſelf; and you hear what he hath owned; that laſt barley-harveſt Coke ſent for him to mend his copper, and then ordered him to meet him at another place, which was accordingly done; when



Coke told him, That he had a thing for him to do, but it was not to be done preſently; and if he would do it, he ſhould want for nothing. And when he aſked him, what it was? He ſaid, To ſet Criſpe aſide, that is, to kill him; and Coke gave him eighteen pence. That then he told him, he could not do it; that Coke ſolicited him ſeveral times afterwards to murder Criſpe; the particulars whereof I do not enumerate, becauſe they principally relate to Coke, againſt whom it is not evidence; but yet they ſo far relate to Woodburne, as to ſhew his knowledge and deliberation in this matter; therefore to come to the day whereon this fact was done, Woodburne ſaith, That about eight or nine in the morning, Coke ſent for him, and told him, that that day they ſhould have the faireſt opportunity to kill Mr. Criſpe; and it was agreed between them, that Woodburne ſhould be in the church-yard, at Mr. Morrice's porch, about eight o'clock in the evening. He accordingly went with his hedge-hook, or bill, which hath been here produced. Coke came out to him twice by himſelf, and the third time, a little after ten o'clock, Coke and Criſpe came out together; and then Coke whiſtled, which was the ſignal between them; and thereon Woodburne came up, and owns, that with his hook he cut and knocked down Criſpe, and that though he never heard Criſpe ſwear before, yet that now, as Criſpe was falling, he ſwore God damn him; whereon he gave him thoſe ſeveral other wounds and blows that Criſpe received; and then reflecting on what he had done, immediately went to his own houſe, where he was about to take a rope to hang himſelf.

By this defence of Woodburne, you ſee that he doth not deny the aſſaulting and wounding of Mr. Criſpe; but that what he chiefly inſiſts on is, that what he did was by the ſolicitation and procurement of Mr. Coke; which is no juſtification or excuſe. However, he hath called two witneſſes, Ann and Sarah Woodburne, his two daughters, to prove that Coke did frequently ſend for their father, and often came to him at his own houſe, and would be in private conference together, which probably was about this matter; but if it were, this only confirms what Woodburne inſiſts on, that he was ſolicited and hired by Coke to do this fact; which, as I ſaid, will neither juſtify nor excuſe him; for no man is to obey the unlawful commands, or hearken to the illegal advices, of any other perſon whatſoever.

As for Mr. Coke, that which he principally puts his defence upon, is, that his intent was to kill and murder Mr. Criſpe, but not to maim him, or to ſlit his noſe, or to diſfigure him in



in ſo doing; and therefore, though in purſuance and execution of the attempt to murder Mr. Criſpe, they ſlit his noſe, or might thereby diſfigure him, yet that not being their intention and deſign, he is to be acquitted on this indictment, wherein the intent of the party is one of the principal ingredients to make him guilty.

That this attempt on Mr. Criſpe was deſigned, malicious, and by laying in wait, the evidence is very ſtrong; there hath been alſo very ſtrong evidence given, that the noſe of Mr. Criſpe was ſlit by Woodburne, and that Coke was preſent on the ſame deſign with Woodburne.

But the thing chiefly inſiſted on is, that the ſlitting of Mr. Criſpe's noſe was not with an intention in ſo doing to maim or diſfigure him; and if it were not with that intent, then the priſoners will not be guilty upon this indictment.

Now, Gentlemen, what the intent of theſe perſons was in ſlitting Mr. Criſpe's noſe, you are to try; this is a matter of fact for your conſideration and determination: it is the ſame in other felonies, where the intent of the party makes the crime. Burglary is breaking open an houſe in the night-time, with an intent to commit a felony; though no felony be committed, yet if there was an intent to do it, it is burglary; which intent is to be tried by the Jury. Larceny, or theft, is taking away another man's goods, with an intent to ſteal; if it were without ſuch an intent, it would only be a treſpaſs, and no larceny; but whether it were or were not with ſuch an intent, is a matter of fact to be inquired into and determined by the Jury. Nay, the intent is ſo neceſſary in all felonies, that a perſon who hath no intent or deſign, as a madman, lunatick, infant, &c. cannot commit felony for that very reaſon; becauſe he cannot have any intent or deſign in his actions. So that in this caſe you are to try no other matter than what is tried in other felonies, *viz.* the intent of the party.

Now how is the intent of the party diſcovered in other caſes? By the facts themſelves, by the precedent, concomitant, and ſubſequent circumſtances of the facts, by the manner of doing, and the like.

There are ſome caſes where an unlawful or felonious intent to do one act may be carried over to another act, done in proſecution thereof; and ſuch other act will be felony, becauſe done in proſecution of an unlawful or felonious intent: as, if a man ſhoots at a wild fowl, wherein no man hath any property, and by ſuch ſhooting happens unawares to kill a man; this homicide is not felony, but only a [illegible] adventure or chance-medley, becauſe it was an accident

happened in the doing of a lawful act: but if this man had ſhot a tame fowl, wherein another had property, but not with intention to ſteal it, and by ſuch ſhooting had accidentally killed a man, he ſhould then have been guilty of manſlaughter, becauſe done in proſecution of an unlawful action, *viz.* committing a treſpaſs on another's property: but if he had had an intention of ſtealing this tame fowl, then ſuch accidental killing of a man would have been murder, becauſe done in proſecution of a felonious intent, *viz.* an intent to ſteal. So a man of malice intends to burn one houſe, in execution thereof he happens to burn another houſe; this is a malicious and felonious burning of this other houſe, becauſe ſprung out of a malicious and felonious intent. The like may be inſtanced where poiſon is intended to be given to one perſon, and another takes and eats it, and thereby dies. And other caſes there are of the like nature, where acts done in proſecution of felonious intents participate of the nature of their original from whence they ſpring.

But now the indictment on this ſtatute is for a certain particular intent; for purpoſely, maliciouſly, and by lying in wait, ſlitting Mr. Criſpe's noſe, with an intention in ſo doing to maim or disfigure: and you are to conſider, whether the ingredients neceſſary to make this a felony within the ſtatute, have been proved to your ſatisfaction. The facts neceſſary to be proved on this indictment are, that on purpoſe, and of malice forethought, and by lying in wait, they unlawfully ſlit the noſe of Mr. Criſpe, with intention in ſo doing to maim or disfigure. As to the fact of ſlitting the noſe, that is directly and poſitively ſworn: there can be no doubt but that it was an unlawful ſlitting. Then the next thing for your conſideration will be, whether this unlawful ſlitting was on purpoſe, of malice forethought, and by lying in wait. As to this, a great deal of evidence hath been given; and what paſſed before, and at the time of the fact, will guide you herein. And if on a review of the evidence, you ſhall be of opinion, that this unlawful ſlitting of the noſe was on purpoſe, of malice fore-thought, and by lying in wait; then the next queſtion will be, whether this was an intention to disfigure? Facts do in ſome meaſure explain themſelves; and the circumſtances preceding and accompanying thoſe facts, and the manner of doing them, do many times more fully explain and declare the intent of the party. The priſoner, Mr. Coke, inſiſts, that their intention was to murder, and not to maim; and that if they did maim or ſlit the noſe, it was with an intention to kill, and

not



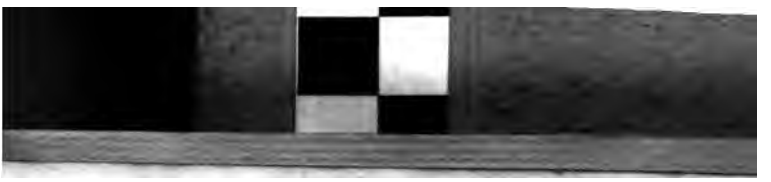
not with an intention to maim or disfigure. On the other ſide, it is inſiſted on by the King's Counſel, that though the ultimate intention might be to murder, yet there might be alſo an intention to maim and disfigure, and though the one did not take effect, yet the other might: an intention to kill, doth not exclude an intention to maim and disfigure. The inſtrument made uſe of in this attempt was a bill, or hedging-hook, which in its own nature is proper for cutting and maiming; and where it doth cut or maim, doth neceſſarily, and by conſequence disfigure. The attempt intended on Mr. Criſpe was immediately to his perſon, to do him a perſonal injury. Beſides, the manner of doing and perpetrating this fact is proper to be conſidered; that it was done by violence, and in the dark, where the aſſailant could not well make any diſtinction of blows; but knocked and cut on any part of Mr. Criſpe's body where he could, till he had ſunk him down, and done to him whatever elſe he pleaſed. And if the intention was to murder, you are to conſider, whether the means made uſe of, in order to effect and accompliſh that murder, and the conſequences of thoſe means, were not in the intention and deſign of the party; and whether every blow and cut, and the conſequences thereof, were not intended, as well as the end for which it is alledg'd thoſe blows and cuts were given.

All theſe ſeveral things, which I have mentioned, are proper for your conſideration: you will add to them your own obſervations; and if, upon the whole, you are ſatisfied from the evidence, that Woodburne did on purpoſe, and of malice fore-thought, and by lying in wait, unlawfully ſlit the noſe of Edward Criſpe, with intention, in ſo doing, to maim or disfigure; and that Arundel Coke was feloniouſly preſent at the commiſſion of this fact, and aiding and abetting therein, then you will find them Guilty: but if this hath not been proved to your ſatisfaction, then you are to acquit them, and find them Not Guilty.

Then the Jury brought in their Verdict GUILTY.

When Coke was brought up for judgement on the following day, he addreſſed the Court as follows:

Though your Lordſhip did not think it proper yeſterday to aſſign me Counſel, yet I hope your Lordſhip will now give me leave to ſpeak for myſelf; eſpecially ſince I am the firſt unhappy inſtance of indictment on this ſtatute; no indictment, as far as it appears by the Law-Books, was ever yet founded on this ſtatute, and therefore ought to be very well weighed; eſpecially in the firſt inſtance to which it appears to have been ever applied. It is a very penal ſtatute,



and conſequently by the known rule of law not to be carried beyond the expreſs letter of it; conſequently no crime, of what nature or magnitude ſoever, can fall within the purview of it, but ſuch as is identically the ſame in every circumſtance with that deſcribed by the words of the ſtatute itſelf.

The crime deſcribed by the ſtatute is the unlawful cutting out, or diſabling the tongue, putting out an eye, ſlitting the noſe, cutting off a noſe or lip, or diſabling any limb or member, attended with theſe particular circumſtances;

Firſt, on purpoſe and of malice forethought.

Secondly, by lying in wait.

Thirdly, with intention in ſo doing to maim or disfigure in any of the manners before mentioned in the ſtatute.

Theſe circumſtances muſt all concur to conſtitute that particular crime deſcribed by the ſtatute; and where any of them are wanting, of what magnitude ſoever the offence may be, it is not the offence which the ſtatute has ſpecified.

If the firſt circumſtance be wanting, no man can ſay that any offence, though attended with the other two, can fall within the ſtatute; this is ſufficiently plain of itſelf.

As to the ſecond; *A.* and *B.* of malice forethought, appoint and meet to fight a duel; *A.* in the rencounter runs *B.* into the eye, and puts it out; no body has ever imagined this to be within the ſtatute, becauſe the circumſtance of lying in wait is here wanting.

As to the third; ſuppoſe *A.* lies in wait to rob *B.*, *B.* reſiſts, and in the ſcuffle is wounded, as the ſtatute deſcribes, but gets off. This is a caſe which very frequently happens, yet no one ever thought it to be within the ſtatute, nor was any one ever indicted for this upon it: the only reaſon of which muſt be, becauſe the intention was to rob and not to maim and disfigure the perſon.

In my caſe, if it be taken upon the evidence of Mr. Criſpe, nothing more appears than the aſſault itſelf: if my confeſſion be read, the lying in wait, and the malice forethought will be proved; but then it will be likewiſe proved, that I had no other intention but to kill, and had no other part, but by giving orders to Woodburne for that purpoſe; and my confeſſion muſt be taken together.

Nor is it an objection to ſay, that the crime which is proved by the evidence is much worſe than that which is deſcribed by the ſtatute; for if it is worſe, then it cannot be the ſame. Even in caſes of crimes by the common law, if upon an indictment for a crime of an inferior nature, the evi-

evidence proves the fact, attended with circumſtances w
bring it within the deſcription of a crime of ſuperior
ture, the perſon indicted muſt be acquitted. At Sum
Aſſizes at Dorcheſter, Anno 1712, a woman was indi
before Mr. Juſtice Eyre, for the murder of another wom
upon this evidence it appeared, that the perſon murd
was her miſtreſs, which made the crime petty-treaſon.
Judge directed this matter to be ſpecially found, and u
conference with all the Judges, it was held, ſhe ought t
acquitted upon this indictment, as ſhe accordingly was;
was afterwards indicted for petty-treaſon, and convicted
executed thereupon.

When a new offence has been created by ſtatute, o
old one made more penal, the utmoſt ſtrictneſs has alw
been uſed to comply with the letter of the ſtatute, what
inconveniencies might reſult from ſuch a reſtraint.

As for example:

By the ſtatute of the 39 *Eliz.* cap. 15, Clergy is ta
away from any perſon or perſons who ſhall be convicte
taking any money, goods or chattels out of any dwelli
houſe, &c. in the day-time, to the value of five ſhilli
One Evans and one Finch were indicted on this ſtat
1 *Croke* 475 *Evans* and *Finch's* caſe: the caſe was thus u
the evidence, that Evans, by a ladder, climbed to the
per-window of one Audley's houſe, and took out the
forty pounds; and that Finch ſtood upon the ladder,
view of Evans, and ſaw Evans in the chamber, and
aſſiſting and helping to the committing of the robbery,
took part of the money: upon a ſpecial verdict it was
judged, that becauſe Finch did not actually enter the ch
ber, and take the money, though what he did amounte
a taking by conſtruction of law, and was ſuch a taking
made him a felon; yet the very letter of all penal ſtat
muſt be purſued, and therefore he, *id eſt*, Finch had
Clergy, and Evans was hanged.

Numerous caſes might be put of this kind of nicety in
conſtruction of penal ſtatutes.

To mention but one more: by the ſtatute of 1 *Edw.*
cap. 12, clergy is taken away from ſuch perſons as ſhall
convicted for the felonious ſtealing of horſes, geldings,
mares.—So ſcrupulouſly did the Judges adhere to the le
of this law, that there was forced to be another ſtatute ma
viz. 2 & 3 *Edw.* VI. cap. 33, to enact, that a perſon c
victed for felonioufly ſtealing one horſe, ſhould be ouſted
his clergy in the ſame manner as if he had ſtole two.

Nor is it in this caſe enough to ſay, the Jury are judges of all this: for as the evidence now appears, and is admitted, it is matter of law, how far this evidence thus admitted on all hands is ſufficient to ſupport this indictment. If it were in a civil caſe, the party might demur to the evidence. But if he is not allowed that liberty in criminal caſes, it is upon the common notion, that the Judges are the priſoner's counſel; and are obliged to determine all the matters in law ariſing upon the evidence, as much as if the perſons had demurred to that evidence.

And, as in this caſe, the priſoner admits the evidence given to be true, and inſiſts upon it, that it doth not ſupport the indictment; and therefore has a right to have the opinion of the Judges thereupon, as much as if the evidence were ſtated at length upon the record (as it muſt be in the caſe of a demurrer to evidence), and nothing ought to be left to the Jury, but under the Judges directions as to point of law.

In all theſe caſes therefore, my Lord, it has been uſual to allow the fact to be ſpecially found; which gives the priſoner the advantage he might have had by the demurrer to the evidence.

Serj. Selby.—My Lord, I do agree with the priſoner at the bar, that this is a very penal ſtatute, and that theſe facts muſt be made out to bring his caſe within the letter of the Act, *viz.* an intention or purpoſe, of malice forethought, to maim or diſfigure in ſuch a manner as the ſtatute deſcribes; a lying in wait for that purpoſe; a maiming, or diſfiguring accordingly; and an abetting and being privy to theſe facts: theſe are all facts which the Jury only could determine, either by poſitive, preſumptive, or circumſtantial evidence; for no man's thoughts or intentions can be otherwiſe proved than by his actions. My Lord Chief Juſtice hath left the whole evidence of theſe facts to the Jury, who by their verdict have found all theſe facts as laid in the indictment, againſt which nobody can now open his mouth: we apprehend therefore that no matter of law hath ariſen, and that what hath been inſiſted on by the priſoner is beſide his caſe, and needs no anſwer.

Serj. Branthwait.—My Lord, the Jury have found him Guilty. I apprehend nothing can properly be alleged now by Mr. Coke that is contrary to the verdict: if there is any fault in the indictment, we are ready to anſwer any objections he ſhall make againſt it. That he does not pretend to. What is now offered by him is againſt the verdict, and contrary to what is found by the Jury. I beg

your

your Lordſhip's leave to give an anſwer to the objection is pleaſed to make againſt the verdict, however impro and out of time made, for the ſatisfaction of himſelf, of the perſons here preſent. I agree, a penal Act ſhal be conſtrued by equity, or carried farther than the w or letter of the Act, as the caſes mentioned by hi prove, but affirm, that this preſent caſe is within the w and meaning of the Act: for though the ultimate inte Mr. Cope might be to murder Mr. Criſpe (as by him leged in excuſe of himſelf) all the means made uſe effect that intent were alſo on purpoſe, and ſuch blows not be given by an inſtrument, without an intent to and disfigure. They were given by one lying in wai purpoſe; and the fact and manner of doing the ſame ciently prove, and are a certain and neceſſary indicatio the intent. The defendants might have an intent t off, or ſlit the noſe; put out an eye, or diſmember; an intent alſo to kill and deſtroy; one intent did take e the other not. The defendants ought not to anſwe what was not done, but ought to anſwer for what was d which was the ſlitting of Mr Criſpe's noſe, on purpoſ maim and disfigure him, by one lying in wait; which that is required by the Act.

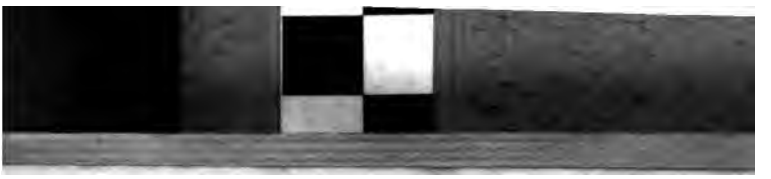
As to the objection; that if *A.* and *B.* go together to a duel, if *A.* ſlit the noſe of *B.* this is not within the the reaſon is, becauſe there is no lying in wait.

As to the caſe of *A.* lying in wait to rob *B*, I with ſubmiſſion do ſay, that if *A.* lie in wait to rob *B.* an effect that purpoſe with the greater eaſe, *A.* on purpoſe members *B.* or puts out his eyes, or does any other prohibited by the Act; though *A.* be hindered from rob *B.* he is within the Act of Parliament; for the intent purpoſe to rob will be no excuſe to one that ſhall con the facts prohibited by the Act.

As to the caſe of Evans and Finch, *Cr. Car.* 473 39 *El.* which takes away the Clergy from him that e and ſteals: Finch was not within the ſtatute, and had Clergy; for the expreſs words of the ſtatute take away Clergy from him that enters the houſe, which Finch not. As to the indictment of a ſervant for murder, in ki her miſtreſs; it is plain, that it is a crime of a higher gree than murder, it is an offence of another ſpecies, petit-treaſon, and not murder.

The ſame anſwer may be given to the other caſes tioned, where the words of an Act of Parliament are exp No caſe ſhall be conſtrued within a penal Act, but wh

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within the words: but as to the preſent caſe, the Jury have found every fact that the Act of Parliament requires, that an unlawful aſſault was made on Mr. Criſpe by the priſoners; that his noſe was ſlit on purpoſe to maim and disfigure him, by lying in wait. And all theſe facts were proved by plain, clear, and I believe convincing evidence to every perſon that heard the trial. I am ſure the priſoners cannot complain of any hardſhip done them; the proſecution was carried on for the ſake of juſtice, for the ſafety of his Majeſty's ſubjects. This being the firſt inſtance of a crime ſo heinous, cruel, barbarous, and inhuman, that has been committed ſince the making the Act of Parliament, it is hoped by this proſecution a ſecond will never be committed; for which reaſon, I pray your Lordſhip's judgment for the King againſt the priſoners.

Mr. Raby.—My Lord, I did expect at this time I ſhould have heard, from this unhappy gentleman, ſomething in arreſt of judgment; ſomething to ſhew that this indictment and record, now before your Lordſhip in judgment, had been inſufficient, and ſuch as your Lordſhip could not have proceeded upon to give judgment againſt the priſoners: but I do not perceive any thing has been objected to this indictment or record; and therefore ſince nothing appears, or is objected, they muſt be taken to be ſufficient, and ſuch as your Lordſhip ought by law to give judgment upon againſt the priſoners now at the bar.

But this gentleman has been pleaſed to take notice of the Act of Parliament on which this proſecution is founded: he has alſo made ſome mention of the facts which have been given in evidence againſt him; and cited ſome caſes (as I apprehend) to ſhew, that penal ſtatutes, and criminal Acts of Parliament, ought not in conſtruction to be carried beyond the letter and words of the Act. This which he has offered (as I take it) is now meant to ſhew (or at leaſt that he apprehends) that from the evidence given, it has not fully appeared he is guilty of the offence with which he ſtands charged within the ſtrict words and meaning of this Act of Parliament: and for this end he has been pleaſed to make ſome obſervations from the words of the ſtatute, what things he apprehends to be neceſſary to bring him within the compaſs of this Act, *viz.* That ſuch wound or maiming, as is deſcribed by the ſtatute, ought to be,

1. On purpoſe, and of malice forethought.
2. By lying in wait.
3. With an intention to disfigure.

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All theſe have been already admitted to him; and he will ſee every one of theſe circumſtances not only taken notice of by us in our obſervations upon the evidence, but alſo more fully by your Lordſhip, before the Jury gave their verdict.

But with what intent this fact was done, whether of malice forethought, by lying in wait, and with intent to diſfigure, are circumſtances only to be collected from the evidence and the facts themſelves; of which neither we nor the Court can determine; but can only be enquired of, and determined by the Jury; and therefore, though it would be a full anſwer to what is now objected, to ſay, that the Jury have conſidered of the evidence, have determined upon it, and found you guilty of the indictment, with all thoſe circumſtances which the priſoner objects are neceſſary to bring the offence within the ſtatute; though this, I ſay, might be anſwer; yet for the juſtice of this proceeding, and to ſatisfy the priſoner in his own objections, and that they ſhould not paſs unanſwered, your Lordſhip will permit me to take notice of the caſes cited, and alſo to recollect the evidence, ſo far as the priſoner has made it neceſſary to repeat it.

I confeſs, it is with concern I mention it again; for I would not do any thing which might add to the weight of thoſe afflictions which this unhappy gentleman is under, had not he himſelf made it neceſſary to take farther notice of it.

As to the caſes cited, only two of them which he mentions are cited to be adjudged; that at Dorcheſter by Mr. Juſtice *Eyre*, that a woman was indicted for murder, and upon evidence it appeared to be a different offence, *viz.* petit-treaſon, for ſhe had killed her miſtreſs; and that thereupon Mr. Juſtice Eyre cauſed her to be indicted for petit-treaſon, and ſhe was convicted. Certainly, my Lord, that judgment was right, and very juſt; for when it appeared upon evidence that ſhe was guilty of a diſtinct and different offence than that of which ſhe ſtood indicted, could any thing be more juſt, than to cauſe her to be indicted for that offence of which, upon the nature of the evidence, ſhe appeared to be guilty. The ſecond caſe cited of Evans and Finch (which is reported in *Cro. Car.*) is no more than this: Evans was hanged; Finch had his Clergy, and was only burnt in the hand; and with great reaſon: for the ſtatute 39 *Eliz.* which takes away Clergy, takes the Clergy only from him that enters; and therefore to have taken the Clergy from

from Finch, who did not enter, had been unjuſt and unreaſonable. And as to what is mentioned of the ſtatute 2 & 3 *Ed.* VI. cap. 33, made in explanation of the ſtatute which took Clergy from him who ſtole horſes, and to take Clergy from him who ſtole only one horſe, there is ſuch an Act of Parliament; but this Act and the caſes cited, only ſhew that regard has always been had not to extend penal ſtatutes beyond the words of them. But before theſe caſes were mentioned (and indeed had they never been cited) this rule of conſtruction had been allowed to the priſoner; for all the particulars now inſiſted on by the priſoner were before taken notice of by the Court, as circumſtances neceſſary to make out the offence againſt the priſoner: nor has one of thoſe circumſtances paſſed without obſervation; but the Court did with great juſtice before declare thoſe circumſtances to be neceſſary ingredients to prove this offence. And as to the other caſes, they are to the ſame purpoſe, and not cited as caſes adjudged; and therefore I need not take further notice of them. But certainly no inferences can be drawn from the caſes cited, or any the leaſt colour to ſay, thoſe caſes prove that the priſoner is not guilty of the offence he ſtands charged with, and of which he is convicted.

I am ſorry he has given this occaſion to mention again the fact which has been proved, from whence it appears that the Jury have given an impartial and juſt verdict.

It cannot be forgot, that this was conſulted and premeditated for three years and more, before it was put in execution; and therefore it was certainly purpoſed and of malice forethought; alſo that it was by lying in wait. Certainly this unhappy gentleman cannot have forgot the ſignal he gave: and to what purpoſe was that ſignal, if none was in waiting to hear it? And that this was with an intent to disfigure, muſt be ſubmitted upon the fact and the evidence. A man uſes a weapon fit to maim and disfigure, he cuts another on the face and does disfigure him, ſhall he afterwards be at liberty to ſay, it was not his intent ſo to do? How dangerous that would be is obvious to every one; this Act would then be eaſily eluded, if it ſhould be ſufficient, if it ſhould avail an offender, who has maimed and disfigured another, to ſay, Prove that I intended it; it would be eaſy then to be out of the reach of this Act of Parliament; indeed if that prevailed, none would be within it, it would be an eaſy repeal of this law. It is objected, his intent was to kill: he that intends the end, certainly intends the means, eſpecially thoſe means which he uſes; and

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the means uſed were cutting Mr. Criſpe on the face, and diſfiguring him; and the weapon is ſuch, that, by cutting him on the face with that weapon, could leſs be intended or expected? And if the intent does not appear from this fact, ſure it never can from any: the intent of a man's mind cannot appear but from the act which proceeds from his mind.

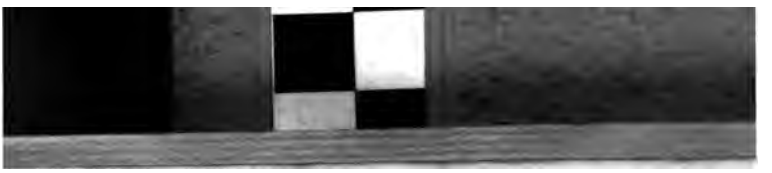
It is ſaid, this is the firſt indictment on this ſtatute: I believe there have not been many; for this is an offence ſo barbarous, that I muſt agree it is ſuch as ſeldom happens, and that by the general laws of our country there was not a puniſhment provided equal to this offence: for our laws (as the laws of moſt nations alſo do) provide againſt offences which moſt frequently happen: but this is an attempt ſo barbarous, that it was ſcarcely imagined any man could be ſo baſe and wicked as to attempt any thing like it, until it happened in the caſe of Sir John Coventry; and then ſuch an abhorrence was ſhewn by the Parliament, that this law was made to puniſh it, and to prevent the like for the future: and as this is the like offence, it ought in juſtice to have the like puniſhment.

I ſhall add no more, but pray your Lordſhip's judgment.

Mr. Lee.—My Lord, the obſervations made at the Bar being after a verdict, and therefore out of time, I ſhall not trouble your Lordſhip with a repetition of the facts that have been proved, further than the priſoner has made it neceſſary for me to mention ſome particulars, in order to make the anſwers to what he hath inſiſted on the more clear and plain.

I believe it has been truly ſaid by the priſoner, that the preſent proſecution is the firſt inſtance of any proceedings on this ſtatute, and I hope it will be the laſt; becauſe it is to be hoped there never will be found any other perſon ſo wicked, as to give occaſion for a proſecution on this ſtatute.

I believe likewiſe, that the true deſign of making this ſtatute was to ſubject perſons to death, who intended to maim only, where the maiming was in ſuch manner as is mentioned in the ſtatute; but I can't think that it does from thence follow, that a perſon who intends to murder, and only maims, is not within this ſtatute; for though it ſhould be taken that there was an intention to murder, yet from the fact done, from the manner of doing it, and from the weapon made uſe of, it ſeems apparent that the priſoner intended to maim; and the Jury have now found that he did ſo intend.



As to the caſes which the priſoner has cited, I beg leave to conſider each of them, and offer ſuch anſwers to them as now occur.

The firſt caſe he has been pleaſed to cite, is thus put:

A. and *B.* of malice forethought, appoint to meet and fight a duel; *A* in the rencounter, runs *B.* into the eye, and puts it out: the priſoner ſays ſuch a caſe would not be within this ſtatute.

I agree it would not, becauſe this caſe has not the circumſtances which the ſtatute requires; for in the caſe thus put there is no lying in wait, which is a circumſtance required by the ſtatute.

It is ſaid, that if *A* lies in wait to rob *B.*, *B.* reſiſts, and in the ſcuffle is maimed in the manner deſcribed by the ſtatute, that ſuch maiming would not be puniſhable by this ſtatute; but I don't obſerve any caſe is cited to prove this aſſertion: and I am, with ſubmiſſion to your Lordſhip, inclined to think, that if there is a lying in wait, with malice forethought, with intent to rob, and in proſecuting this intent, the robbers ſhould aſſault and maim in the manner deſcribed by the ſtatute, that ſuch maiming would be within this ſtatute.

It is ſaid, that though the intent to murder makes the offence worſe than if the intent had been only to maim, yet ſuch intent proves it not to be the ſame offence which is mentioned in the ſtatute: and if a man be indicted of an offence of an inferior nature, and upon the evidence it appears that he is guilty of an offence of a ſuperior nature, the perſon indicted muſt be acquitted; and to prove this, a caſe is cited, which is ſaid to have been before Mr. Juſtice *Eyre* at Dorcheſter Aſſizes. The caſe, as put, is this: a woman is indicted for the murder of another woman: on the evidence it appeared, that the perſon murdered was her miſtreſs, which made the crime petit-treaſon: this was found ſpecially, and upon conference with the Judges, they were of opinion, that the woman ought to be acquitted on this indictment.

Admitting this caſe to have been adjudged, I apprehend it does not affect the preſent caſe.

The law has diſtinguiſhed crimes under different denominations; and as offences are ranked under different ſpecies, ſo the indictment muſt be ſuited to that ſort of crime whereof the party is guilty; and therefore proving a perſon guilty of a fact, known in the law by the name of petit-treaſon, does not prove him guilty of an indictment for murder; murder being an offence which the law has diſtinguiſhed

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from petit-treaſon, and to which it has aſſigned a different puniſhment.

But in the preſent caſe, that offence which is charged in the indictment is proved in every circumſtance, and the facts proved do conſtitute that crime which is made felony without Clergy by the ſtatute. The ſtatute requires lying in wait, it requires malice forethought; it requires ſlitting the noſe, &c. with intent to maim, &c. The indictment charges theſe facts, the witneſſes have proved theſe facts to the ſatisfaction of a Jury, who have found the defendant guilty of the charge as laid.

The priſoner ſays farther, that this is a very penal ſtatute, and that penal ſtatutes are always taken with the utmoſt ſtrictneſs; and, to prove this, cites a caſe adjudged on ſtatute 39 *Eliz.* by which ſtatute Clergy is taken away from any perſon or perſons who ſhall be convicted of taking away money, &c. in any dwelling-houſe, &c. in the day-time, to the value of five ſhillings: and to prove the ſame matter, an inſtance is likewiſe put of the conſtruction on the ſtatute, 1 *Eliz.* cap. 12, which takes away Clergy from ſuch perſons as ſhall be convicted of felonioufly ſtealing horſes, &c. The caſe in the ſtatute 39 *Eliz.* is the caſe of Evans and Finch, *Cro. Car.* 473, in which caſe Finch had his Clergy, becauſe he did not actually enter the chamber and take the money. The conſtruction on *Edw.* VI. was, that Clergy was not taken away from a perſon who feloniouſly ſtole one horſe.

But I apprehend neither of theſe caſes come up to the caſe now before your Lordſhip. As to the caſe of Evans and Finch, which was a caſe upon the ſtatute 39 *Eliz.* by that ſtatute a perſon is ouſted of Clergy who takes away money to the value of five ſhillings in any dwelling-houſe, &c. Finch did not enter into the houſe, for he only ſtood on the ladder; and therefore he was not within the words of that ſtatute, which ſpoke only of perſons who took away goods in an houſe, &c.

As to the conſtruction upon the ſtatute 1 *Edw.* VI. it is plain that the felonious ſtealing one horſe could not be within an Act of Parliament which took away Clergy only from ſuch perſons as feloniouſly ſtole horſes. The reaſon therefore of theſe caſes was, that the facts proved did not bring the perſons accuſed within the words of the ſtatute.

But it is not ſo in the caſe now before your Lordſhips, for the priſoner is found guilty of a fact, which is within the words of the ſtatute upon which he is indicted; and

every circumſtance required to make him guilty of the felony mentioned in the ſtatute has been very fully proved.

My Lord, I am very ſenſible that the objections taken at the bar, being after verdict, did not require theſe particular anſwers; but this being a caſe wherein life is concerned, I hope the impropriety will be excuſed.

Ld. Ch. Juſtice.—I do agree with the priſoner, that this is a penal law, and not to be extended by equity: that he that is guilty within this ſtatute, muſt be guilty of all the circumſtances within it; and if any of the circumſtances preſcribed by the ſtatute be wanting, he is not guilty. And therefore in all thoſe caſes put by you, if any of the circumſtances preſcribed by the ſtatute be wanting in any one of them, ſuch caſe is out of the ſtatute. But whether all the circumſtances required by the ſtatute did not concur in your caſe, was a matter of fact which the Jury, who are the proper judges, have tried; and on ſuch trial they have found them all to concur. You ſeem to argue upon a ſuppoſition of this fact to be otherwiſe than the Jury have found it. The Jury have found you guilty of all the circumſtances within the ſtatute. There was no matter of law in this caſe, but matter of fact; whether on purpoſe, and of malice forethought, and by lying in wait, the noſe of Mr. Criſpe was not ſlit, with intention, in ſo doing, to maim or diſfigure; and whether you were not felonioufly preſent, aiding, and abetting. The Jury had the whole evidence before them; they conſidered of the whole matter, of the preparation and lying in wait to do the fact; of the fact itſelf; of the means and inſtrument made uſe of to do it; of the manner of doing it; and of all the other circumſtances and particulars relating to the fact: and, on the whole, after they had withdrawn, and conſidered amongſt themſelves for ſome time, they have found you guilty within the terms and circumſtances of the ſtatute; ſo that though all the caſes put by you ſhould be very good law, yet they do not any wiſe affect yours, becauſe you are actually found guilty of the crime itſelf.

He then received judgment of death, and was executed, together with Woodburne, March 31, 1722, at Bury St. Edmund's.

Adjudged Cases in the Court of King's-B in Eaſter Term, 1790.

CURTIS v. VERNON *Executor of* PALMER.

This was a caſe on promiſes by the teſtator. Plea, That Palmer died inteſtate, and the defendant never poſ any of his goods, but as executor of his own wrong; adminiſtration was granted to Palmer's widow; and th fendant delivered over to the adminiſtratrix all the effect longing to the inteſtate which came to his hands *. That the defendant recovered 3000l. on a bond in Court in the inteſtate's lifetime; that no goods or effe the inteſtate ever came into defendant's poſſeſſion, e goods of the value of 794l. 13s. 9d. which are not ſuffi to ſatisfy his ſaid debts; and that the adminiſtratrix, as aſſented to his retaining thoſe goods in ſatisfaction o debt.

To theſe two pleas there was a general demurrer, and a der in demurrer, which were argued much at large, an Court took time to conſider the queſtion.

LORD KENYON, Ch. J next day ſaid, we have lo into the authorities which were cited on the part of th fendant (*Whitehead* v. *Sampſon*, *Freem.* 265; 2 *Show.* 3 *Baker* v. *Beresford*, 1 *Sid.* 76: 2 *Ventr.* 180; *William Norwich*, *Sty.* 337; 1 *Rol. Abr.* 923. *L. pl.* 12; and *Vaugh Brown*, 2 *Str.* 1106; *Andr.* 328.); but they do not eſta the propoſitions for which they were adduced, namely, if, *after Action* brought, and *before* plea pleaded, the exec take out letters of adminiſtration, he may plead a retaine his own debt. The caſe in 1 *Sid.* 76, is reported in a confuſed manner; but it concludes with ſaying "that an ex tor *de ſon tort* cannot pay himſelf." Now that goes length of deciding the preſent caſe. And indeed the cited from *Freem. Mod.* and *Strange*, all prove the ſame p that an executor *de ſon tort* cannot retain for his own They alſo take the diſtinction between ſuch an executo *ſon tort* after legaliſing his own wrong by taking out lette

* *This happened after the action was brought.*

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adminiſtration. The caſe in *Strange* ſhews this matter very clearly; where the Court ſaid it would be extremely hard, that if a perſon, entitled to adminiſtration, is oppoſed in the eccleſiaſtical court, and does any acts *pendente lite* to make himſelf executor *de ſon tort*, thoſe acts ſhould not be purged by his afterwards obtaining letters of adminiſtration. And they added, that the granting adminiſtration legaliſes thoſe acts which were notorious at the time. With reſpect to the firſt point of this caſe, the opinion of Lord Ch. J. *Holt* in *Salk.* 313, is deciſive; where he ſays, "if *H.* get the goods of an inteſtate into his hands, and adminiſtration be granted afterwards, yet he remains chargeable as a wrongful executor, *unleſs he deliver the goods over to the adminiſtrator before the action is brought*, and then he may plead *plene adminiſtravit*." From all the authorities it is clear, firſt, that an executor *de ſon tort* muſt deliver over the goods of the inteſtate to the rightful adminiſtrator *before* an action is brought againſt him; and 2dly, that, though he be a creditor of a ſuperior nature, he cannot retain in ſatisfaction of his own debt. Therefore we are of opinion that both theſe pleas are bad; and conſequently that there muſt be

Judgment for the plaintiffs.

DYER *qui tam againſt* HAINSWORTH *and Another.*

This was an information againſt the defendants for packing, exporting, and preſſing together worſted and yarn made of wool, upon the ſtatute 28 *Geo.* 3. *c.* 38, intituled, "An act to explain, amend, and reduce into one act of parliament, ſeveral laws now in being for preventing the exportation of live ſheep, rams, and lambs, wool, woolfels, mortlings, ſhortlings, yarn, and worſted, cruels, coverlids, waddings, and other manufactures, or pretended manufactures made of wool, ſlightly wrought up or otherwiſe put together, *ſo as the ſame may be reduced to and made uſe of as wool again*, mattraſſes, or beds ſtuffed with combed wool, or wool fit for combing, fuller's earth, fulling clay, and tobacco pipe clay, from this kingdom, and from the iſles of Jerſey, Guernſey, Alderney, Sark, and Man, into foreign parts, and for rendering more effectual an act paſſed in the 23d *Hen.* VIII. intituled "An Act for the winding of wool:



The firſt Count ſtated, that the defendants unlawfully exported and conveyed, and cauſed to be exported and conveyed, out of the kingdom of Great Britain, into a certain place out of the kingdom of Great Britain, and out of the iſles of Jerſey, Guernſey, Alderney, Sark, and Man, and each of them, that is to ſay, into a place called Bilboa in Spain, divers, to wit, 2000 pounds weight *of yarn made of wool* of the growth of the kingdom of Great Britain, in contempt, &c. and againſt the form of the ſtatute, &c. whereby and by force of the ſaid ſtatutes the defendants have forfeited to the plaintiff who proſecutes, &c. 300l. being three ſhillings for every pound weight of the ſaid yarn exported and conveyed as aforeſaid. The 2d count was for exporting *worſted made of wool.* The 3d for preſſing together with ſcrews into a certain wrapper, made of canvas, *yarn* made of wool. The 4th for preſſing *worſted* made of wool in the ſame manner; the 5th count was for preſſing together 2000 pounds weight of *yarn made of wool*: and the 6th, for preſſing together 2000 pounds weight of *worſted* made of wool. The 74th ſection of the ſtatute enacts, that all informations grounded on it ſhall be tried by a *Jury to be ſummoned out of any other County* than that where the facts were committed. The facts were committed in the county of *York*, but a *venire facias* was iſſued accordingly into Weſtmoreland, and the information was tried at *Appleby* before Baron *Thomſon*, at the laſt ſummer aſſizes, where *Hainſworth* was found guilty.

Now on his being brought up for judgment in this Court, ſeveral objections were taken. 1ſt. That the defendants ought to have been tried in Yorkſhire, *though by a Jury of a different county*, the ſtatute 21ſt Ja. I c. iv. requiring that all informations on penal ſtatutes ſhould be tried where the offence is committed, and not elſewhere.

2dly. That the 5th Count on which the verdict is taken, does not ſtate the offence deſcribed in the Act of Parliament, the words of the 9th ſect. ſtatute being, "that every perſon who ſhall tranſport, &c. any wool whatſoever of the growth of the kingdom, or any woolfels, mortlings, ſhortlings, yarn, or worſted made of wool, woolflocks, cruels, coverlids, waddings, or other manufactures, or pretended manufactures, made of wool ſlightly wrought up, or otherwiſe put together, *ſo as the ſame may be reduced to and made uſe of as wool again*, or mattraſſes or beds ſtuffed with combed wool, or wool fit for combing or carding, ſhall forfeit 3s. for every pound weight; and ſhall alſo ſuffer ſolitary impriſonment in the common gaol of the county where he is convicted for three

month

months." The 30th and 31ſt ſections extend the puniſhments to perſons preſſing together any wool whatſoever, or any yarn made of wool, or other the woollen or worſted articles by the act prohibited from being exported. Which laſt words relate to *all the preceding terms* in the clauſe; and it ought therefore to have been averred in the information, that the yarn in queſtion was capable of being afterwards made uſe of as wool; which in fact it is ſo ſpun and twiſted as to be incapable of.

3dly. No judgment can be given by this court, becauſe the ſtatute (ſect 31) ſays, *the Court and Juſtices before whom ſuch perſons ſhall be tried and convicted*, ſhall have power and authority to puniſh any ſuch offenders accordingly.

BY THE COURT. As to the firſt and 3d objections, we have no doubt. The trial was properly had in *Weſtmoreland*. And certainly where the proceedings originate in an inferior Court, judgment muſt be given there; but where the proceedings are commenced here, and the record is ſent down to be tried below, the defendant is not properly convicted till the record is returned here; the court of *niſi prius* is merely an emanation from this court, and the proceedings muſt be returned here before judgment can be given. Beſides, in this caſe the impriſonment is not diſcretionary; the ſtatute is imperative. The meaning of that clauſe is, that the Court *ſhall inflict ſuch puniſhment*, and they thereby have power and authority ſo to do.

But they took time to conſider of the ſecond objection; and now

Lord Kenyon, C. J. ſaid, We firſt entertained conſiderable doubt on the ſecond objection; but we are now of opinion that the conſtruction contended for by the proſecutor is the right one, namely, that the words, *ſo that the ſame may be reduced to and made uſe of as wool again*, were not intended by the Legiſlature to apply to *all* the articles enumerated, but muſt be confined to the latter words, *coverlids*, *waddings*, and *other manufactures or pretended manufactures*."

LEE v. CARLTON.

Declaration was filed on the 22d of April; and on Monday the 26th of April, the defendant filed a plea in abatement. As 4 days only are allowed to plead in abatement, the plaintiff ſigned judgment; to ſet aſide which a rule was now obtained to ſhew cauſe. Againſt this rule it was argued, on the authority of a note in *Jennings* v. *Webb* (1 Term Rep. 278) that Sunday ſhould be conſidered as one of the four days, and this plea was therefore filed too late.

BULLER, J.—If the laſt of four days happen on a Sunday, the defendant may plead in abatement the next day; otherwiſe, as no plea can be filed on a Sunday, the time would be limited to three days in ſuch caſes. The note referred to in *Jennings* v *Webb* meant that Sunday ſhould only be conſidered as one of the days when it was not the laſt; for in ſome inſtances when any act is to be done by the party in a limited number of days, as in the caſe of a motion in arreſt of judgment, the party has four law days, when the Court is actually ſitting, in which to do it; and in thoſe caſes Sunday is not one, though it be an intervening day.

Rule abſolute.

ABSTRACT of an Act made in the 30th Year of his preſent Majeſty, to alter, explain, and amend an Act, made in the 28th Year of the Reign of His preſent Majeſty, intituled, "An Act for limiting the Number of Perſons to be carried on the outſide of Stage Coaches, or other Carriages," and for regulating the Conduct of the Drivers and Guards thereof.

Whereas the regulations and penalties eſtabliſhed and inflicted by the ſaid act (28 *Geo.* III. c. 57) have proved inſufficient to anſwer the good purpoſes thereby intended:

Be it enacted, that, from and after the 29th of September, 1790, if the driver of any coach, chaiſe, or other carriage of the like ſort, drawn by three or more horſes, and going or travelling for hire, ſhall permit or ſuffer more than one per-

ſon on the coach box, beſides himſelf, and four perſons on the roof; and if ſuch coach, chaiſe, or other carriage, ſhall be drawn by leſs than three horſes, more than one perſon on the coach-box, and three perſons on the roof, (except the driver of ſuch coach, chaiſe, or other carriage, drawn by leſs than three horſes, which ſhall not go or travel a greater diſtance than twenty-five miles from the Poſt Office in the City of London; and who ſhall not carry more than one perſon on the coach box, and four perſons on the roof, at one and the ſame time), to go and be conveyed by any ſuch coach, chaiſe, or carriage, reſpectively; every ſuch driver ſhall pay to the Collector of the Tolls, at every turnpike gate through which ſuch carriage ſhall paſs, the ſum of five ſhillings for each and every perſon above the number, ſo as above limited and allowed to be conveyed, which every ſuch collector is hereby authorized to aſk, demand, and receive; and if any ſuch paſſenger or paſſengers, beyond the number ſo limited as aforeſaid, ſhall be ſet down, or taken up, whereby the ſaid payment of the ſaid ſum of five ſhillings may be evaded, then and in every ſuch caſe the driver of ſuch carriage ſo offending, and being convicted on ſuch offence, either by his own confeſſion, the view of a juſtice, or the oath of one witneſs before any juſtice of the peace, where ſuch offence ſhall be committed, ſhall, for every ſuch offence, be committed to the common gaol, or houſe of correction, where ſuch offence ſhall have been committed; there to remain, without bail or mainprize, for any time not exceeding one calendar month, nor leſs than fourteen days, at the diſcretion of the juſtice or juſtices by whom ſuch offender ſhall be convicted.

And be it further enacted, that the ſaid ſum of five ſhillings ſhall be collected, and recovered in like manner as the turnpike Tolls at the gate where ſuch payment by this act directed to be made, are authorized to be collected, and recovered.

And be it further enacted, that from and after the ſaid 29th of September, there ſhall be painted on the outſide of each of the doors of every ſuch ſtage coach, or other carriage, (the coaches carrying the mail, under the direction of the Poſt-maſters General, excepted) in large and legible characters, the chriſtian and ſurname of the proprietor, or of one of the proprietors, of ſuch coach or other carriage; and in caſe of there being more than one proprietor of ſuch coach or other carriage, and any one of them ſhall reſide within the cities of London or Weſtminſter, or the limits of the bills of mortality, then and in

ſuch

ſuch caſe the name of ſuch laſt-mentioned proprietor ſhall be the name to be put upon ſuch carriage, as above directed.

And be it further enacted, that if the coachman, or perſon having the care of any ſtage coach, or other ſuch carriage, ſhall permit or ſuffer any other perſon to drive the ſame, without the conſent of the paſſengers within ſuch coach, or other carriage, or ſhall quit the box without reaſonable occaſion, or for a longer ſpace of time than ſuch occaſion may require; or ſhall, by furiouſly driving, or by any negligence or miſconduct, overturn the carriage, or in any manner endanger the perſons or property of the paſſengers, or the property of the owners or proprietors of ſuch carriage; every ſuch coachman ſo offending, ſhall, for every ſuch offence, forfeit and pay any ſum not exceeding five pounds, nor leſs than forty ſhillings.

And be it further enacted, that if any ſuch perſon going or travelling as a guard to any ſtage coach, or other ſuch carriage, ſhall fire off the arms he is entruſted with, either while the coach or carriage is going on the road, or going through, or ſtanding in any town, otherwiſe than for the defence of ſuch coach or other carriage, every ſuch perſon ſhall, for every ſuch offence, forfeit and pay the ſum of twenty ſhillings.

And be it further enacted, that the penalties by the ſaid Act inflicted on peace officers, neglecting to execute warrants, ſhall extend to like refuſals in purſuance of this Act; and that the penalties and forfeitures inflicted by this Act ſhall be recovered and applied in the ſame manner, as by the ſaid Act is directed reſpecting the penalties thereby inflicted; and that the forms of proceedings relative to the ſeveral matters contained in this Act ſhall be the ſame as thoſe in the ſaid Act, with ſuch Additions or variations only as may adapt them to the particular circumſtances of the caſe; and that no objection ſhall be taken, on account of want of form only.

CROWN CASES.

Rex v. Mason.

In the King's Bench, June 1, 1788.

At the Quarter Seſſions at Worceſter, Thomas Maſon had been convicted on the ſtatute 30 *Geo.* II. cap. 24, and received ſentence of tranſportation for ſeven years. The indictment conſiſted of two counts. The firſt charged, that Thomas Maſon, on the 13th of June, 1777, "unlawfully, knowingly, and deſignedly, did obtain from one Robert Schofield divers ſums of money; that is to ſay, the ſum of two guineas, of the value of two pounds two ſhillings of the lawful money of Great Britain, of the proper monies of the ſaid Robert Schofield, by falſe pretences, with an intent then and there to cheat and defraud the ſaid Robert Schofield of the ſame." The ſecond charged, that the ſaid Thomas Maſon, on the 21ſt of July, 1777, "unlawfully, knowingly, and deſignedly did obtain from the ſaid Robert Schofield the ſum of four pounds fourteen ſhillings and ſixpence, of lawful money of Great Britain, of the proper monies of the ſaid Robert Schofield, with intent then and there to defraud the ſaid Robert Schofield of the ſame, to the great damage, &c." and ſo concluding, "againſt the form of the ſtatute in ſuch caſe made and provided."

This indictment was removed by Writ of Error into the Court of King's Bench; and two errors were aſſigned. Firſt, That it does not appear in the firſt count what the particular and ſpecific *falſe pretences* were by which Thomas Maſon obtained the money of Robert Schofield. Secondly, That the ſecond count does not ſtate by what particular means or pretences, or on what particular account, the ſaid Thomas Maſon obtained the 4l. 14s. 6d. with intent to defraud Robert Schofield.

Marryat, for the defendant.—To the firſt count theſe three objections may be made. Firſt, the offence imputed to the defendant is not ſpecified with ſufficient particularity. Secondly, The charge is repugnant. Thirdly, It does not conclude either againſt the peace, or againſt the form of the ſtatute.

Firſt, The offence is not ſpecified with ſufficient particularity. Without having recourſe to Lord Coke's definition of the kind of certainty which is required in law proceedings,



ceedings, it is ſufficient to refer to the rule which Lord Chief Juſtice *De Grey* laid down in Mr. *Horne's* caſe, *Cowp.* 682, "That the charge muſt contain ſuch a deſcription of the crime that the defendant may know what crime it is which he is called upon to anſwer, that the Jury may appear to be warranted in their concluſion of *guilty* or *not guilty* upon the premiſes delivered to them; and that the Court may ſee ſuch a definite crime that they may apply the puniſhment which the law preſcribes." "This," continues his Lordſhip, "I take to be what is meant by the different degrees of certainty mentioned in the books; and it conſiſts of two parts, the matter to be charged, and the manner of charging it. As to the matter to be charged, whatever circumſtances are neceſſary to conſtitute the crime imputed, muſt be ſet out, and all beyond are ſurpluſage;" Now the firſt count of the preſent indictment does not ſpecify the ſort of pretence by which the money is ſuppoſed to have been obtained: the pretence is of the very eſſence of the crime, and conſtitutes the offence. The defendant therefore ſhould have had notice of this, in order to prepare for his defence; and if the pretence had been ſtated, he might have been able to have proved, that he never made ſuch a miſrepreſentation as was imputed to him, beſides, it is the uſual form of the precedents of indictments to ſtate the pretence. In civil actions, a declaration, ſtating that the defendant by divers falſe pretences and miſrepreſentations, had occaſioned an injury to the plaintiff, or had deprived him of a ſum of money, would be adjudged inſufficient. So would a declaration in *aſſumpſit*, ſtating that the defendant was indebted to the plaintiff for divers ſums of money for divers valuable conſiderations; then if theſe objections would vitiate a declaration, *à fortiori* they will apply to an indictment where greater certainty is required. In ſuch an indictment as the preſent, certainty is peculiarly neceſſary, becauſe it has been determined that there are various kinds of pretences which are not within the meaning of the ſtatute; and it cannot be contended that all theſe determinations were previous to the paſſing of the Act; for in *the King* v. *Wheatley*, 1 *Geo.* III. where the *defendant* had been convicted of ſelling malt liquor by ſhort meaſure, the judgment was arreſted on an objection ſimilar to the preſent. In *the King* v. *Munoz*, where the defendant had been convicted for procuring a promiſſory note by *falſe tokens*, under the ſtatute 33 *Hen.* VIII. cap. 1, the judgment was arreſted, becauſe the indictment did not ſpecify the *falſe tokens*; and here *falſe pretences* are equally uncertain,

ling's caſe, and *Popplewell's caſe*, convictions on the ſtatute of 6 and 7 *Will.* III. cap. 11, were quaſhed, becauſe the oaths and curſes were not ſet forth. An indictment alſo has been quaſhed, as being too general, charging that the defendant *male et negligenter ſe geſſit* in execution of the office of Conſtable. So in reſcue it is neceſſary to ſtate for what offence the party was in cuſtody. It is no anſwer in this caſe to ſay, that the indictment purſues the words of the ſtatute; for that anſwer was attempted to be given in the caſe of *Davy* v. *Baker*, 4 *Burr.* 241, and over-ruled:—That was in an action on the ſtatute 2 *Geo.* II. cap. 24, for preventing bribery at elections; and the judgment was arreſted, becauſe the declaration only ſtated that the defendant did receive a gift or reward, without ſpecifying what he received as a reward.

Secondly; The charge is repugnant. It ſtates that the defendant obtained *divers ſums* of money, TO WIT, *the ſum* of two guineas. The ſum alone is repugnant to divers ſums; and if it be rejected as ſurpluſage, it is equally fatal, becauſe then it does not ſpecify what ſums he did obtain. And if this count were to be adjudged ſufficient, without particularizing either the ſums which the defendant obtained, or the pretences by which he obtained them, it would be equally ſufficient to ſtate that he had obtained *divers goods*, without ſpecifying what thoſe goods were.

Thirdly, This count does not conclude either againſt the peace, or againſt the form of the ſtatute. The former of theſe is a ſufficient objection to this count, for every indictment ought to aver the offence to have been committed againſt the peace. It is equally neceſſary that every indictment on a ſtatute ſhould conclude *contra formam ſtatuti*. The judgment upon the preſent record is, *tranſportation*, which is a puniſhment not known to the common law; and therefore, if warranted at all, muſt be ſo by ſtatute. But it is ſaid in 2 *Hawk. P. C.* cap. 25, § 116, "that a judgment by ſtatute ſhall never be given on an indictment at common law, as every indictment which does not conclude *contra formam ſtatuti*, ſhall be taken to be; and therefore, if an indictment do not ſo conclude, and the offence indicted be only prohibited by ſtatute, and not by common law, it is wholly inſufficient, and no judgment at all can be given upon it." It muſt be obſerved, that this is not an application to quaſh an indictment, which depends on the diſcretion of the Court; but this indictment comes before the Court by Writ of Error, and if the Court ſee that the indictment is defective, they are bound to reverſe the judgment.

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As to the ſecond count it was objected, that it was manifeſtly defective, inaſmuch as it did not contain a charge of any crime either againſt the common law or ſtatute law.

Mr. Caldecot, for the Crown.—In anſwer to the objection, that the charge in the firſt count is too general and uncertain, becauſe it does not give the defendant ſufficient notice to prepare his defence; it cannot be denied that the uſe of this general form of indictment is, in many inſtances, eſtabliſhed law; as in thoſe of a common ſcold, where it is not neceſſary to ſpecify any inſtance. So in charging the offence of keeping a bawdy houſe, it is ſaid in *Hawkins* cap. 25, that it is needleſs to ſet forth any circumſtances. The like for keeping a gaming-houſe, or for conſpiracies. So in all caſes of barratry; and *Hawkins* ſays, "It is enough to charge that the offender is a common barrator, without ſhewing any of the particular facts; for barratry is an offence of a complicated nature, conſiſting in the repetition of divers acts in diſturbance of the common peace, all of which it would be too prolix to enumerate in the indictment." If then in a crime ſo defined, it is only neceſſary to ſtate in the indictment that the defendant is a barrator, where the modes in which a perſon may illegally move and promote ſuits are certainly infinite, it is equally unneceſſary in the preſent inſtance to ſtate more than that the defendant obtained the money by falſe pretences; for upon the principle of notice, it is in itſelf much more likely that a defendant ſhould know the particular acts of fraud and deceit which he has practiſed againſt the proſecutor, which is the preſent caſe, than where the proſecutor is at liberty to range through the tranſactions of a defendant's whole life, which is the caſe in a charge of barratry. It is admitted that all the caſes cited were before the 30 *Geo.* II. cap. 24, except that of *Rex* v. *Wheatley*, and that caſe was determined on the ground that it was not an indictable offence. Beſides, this general form of indictment on this ſtatute has obtained ſo long in practice, that it ought to be conſidered as eſtabliſhed law. And it has been held by this Court in many caſes, and particularly in thoſe on the game laws, that printed forms, ſuch as thoſe in *Burn*, ſhew the general ſenſe and underſtanding of the profeſſion. This form of indictment is continued in the lateſt edition of *The Crown Circuit Companion*, which, though not a book of authority, affords hiſtorical evidence of the uſe of this form at the Old Bailey; and in point of fact it is well known that many perſons have been tranſported for this offence under this form of indictment. In all events, there is no ground for the objection in this indict-

dictment; for it ſtates the ſums of money of which the proſecutor was defrauded, and the times when the fraud was committed. To this it is objected, that the charge is repugnant; becauſe it is ſtated that the defendant obtained *divers ſums* of money, that is to ſay, *the ſum* of two guineas. But it is ſufficient if one charge be ſtated under the *videlicet*. With reſpect to the ſecond count, it is good, as charging the defendant with an offence at common law, namely, for cheating.

BULLER, J.—Several objections have been made on the part of the defendant; but the material one, on which I found my judgment is, that the indictment does not ſtate what the falſe pretences were. The queſtion is not a new one; for I remember a caſe when I was at the bar, though the name of it does not occur to me now, and I argued it on the analogy to the caſe in *Strange* for obtaining a note by falſe tokens, which entirely governs this. That was a caſe on the ſtatute 33 *Hen.* VIII. cap. I., which makes it an offence to obtain money or goods by falſe tokens. The ſtatute 30 *Geo.* II. cap. 24, only enlarges the deſcription of the offence in the ſtatute of *Hen.* VIII. Both ſtatutes are made in *pari materiâ*; and whatever has been determined in the conſtruction of one of them, is a ſound rule of conſtruction for the other. The judgment was arreſted in the caſe in *Strange*, becauſe the indictment did not ſpecify the *falſe tokens:* then by the ſame reaſon an indictment on the 30 *Geo.* II. cap. 24, which ſpeaks of *falſe pretences*, muſt ſtate what the falſe pretences are, otherwiſe the indictment is bad: there is no diſtinction between the two caſes; the ſame objection which held in the one, muſt alſo prevail in the other. With reſpect to the form of the indictment; I am clear that the precedents have not been univerſally in the ſame form as the proſecutor's Counſel has ſtated, for it was otherwiſe in the firſt indictment on this ſtatute which I ever tried; the indictment did ſtate what the falſe pretences were. The other objections ſeem to have great weight in them; but it is not neceſſary to conſider them in this caſe, becauſe I am of opinion that the firſt objection is fatal, and that the judgment muſt be reverſed.

GROSE, J.—I am of opinion, with my brother *Buller*, that the objection, that the pretences are not ſpecified, is deciſive, and for the reaſons mentioned by the defendant's Counſel; that the defendant may know what he is to defend, and the Court may ſee what puniſhment they are to inflict. Theſe reaſons apply to all offences. The caſes, mentioned at the bar, of a ſcold, of barratry, and keeping

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o'clock one of the ſoldiers was ſeen ſtripped, and a party of five or ſix came up, fell upon him, and beat him cruelly. A woman called out from a window, "You rogues, you will murder the man." The priſoner, who had before, with his ſword in the ſcabbard, driven a part of the mob down the ſtreet, returned; when ſeeing his comrade thus uſed, he drew his ſword, which he brandiſhed in the air, and deſiring the mob to ſtand clear, ſaid, "There it is, I'll ſweep the ſtreet." The mob preſſed in upon them, and he ſtruck at them with the flat ſide ſeveral times. The mob then fled, and he purſued one of them down the ſtreet to a place called *the Swell*. The ſoldier who was ſtripped got up, and ran into a paſſage to ſave himſelf. The priſoner returned, and aſked if they had murdered his comrade. The people came back and aſſaulted him ſeveral times, and then ran from him. He ſometimes brandiſhed his ſword, and then ſtruck fire with the blade of it upon the ſtones of the ſtreet, calling out to the people to keep off. At this time the deceaſed, who had a blue jacket on, and might be miſtaken for a keelman, was going along about five yards from the ſoldier; but, before he paſſed, the ſoldier went to him, and ſtruck him on the head with his ſword. The deceaſed ran ſome paces and fell down, roſe again, ran a few paces further out of the priſoner's ſight, fell down again, and immediately expired. The mob ran into the paſſages near *the Swell*. The ſoldier ſaid he had been badly uſed; and it was the opinion of two witneſſes, that "if he had not drawn his ſword, they would both of them have been murdered."

The Judges were of opinion this was only manſlaughter.

REX v. SNOW.

The following caſe was ſubmitted to the conſideration of the TWELVE JUDGES, at Serjeant's-Inn-Hall, on the firſt day of Michaelmas Term, 1776, by Mr. Juſtice *Willes*.

At the preceding Summer Aſſizes for Northampton, William Snow was indicted for the murder of Thomas Palmer. It was queſtionable from the evidence, whether the crime amounted to murder, or to manſlaughter; and Mr. Serjeant *Vaughan*, at the requeſt of the learned Judge, came into Court, and argued the point of law in favour of the priſoner, with great ability. The Jury however thought that there appeared to be an *implied malice* in the priſoner's behaviour,

haviour, and they accordingly found him guilty of murder. But the judgment was reſpited, in order to take the opinion of the JUDGES, Whether this conviction was warranted by the circumſtances of the caſe?

CASE.

William Snow was a ſhoe-maker; and Thomas Palmer a labouring man. They lived in the ſame neighbourhood; and at no great diſtance from each other. On the afternoon of the day mentioned in the indictment, the priſoner, very much intoxicated by liquor, paſſed accidentally by the houſe of the deceaſed's mother, while he was thatching an adjacent barn. They entered into converſation; but on the priſoner's abuſing the mother and ſiſter of the deceaſed, very high words aroſe on both ſides, and they placed themſelves in a poſture to fight. The mother of the deceaſed hearing them quarrel, came out of her houſe, threw water over the priſoner, hit him in the face with her hand, and prevented them from boxing. The priſoner went into his own houſe, and in a few minutes came out again, and ſet himſelf down upon a bench before his garden gate, at a ſmall diſtance from the door of his houſe, with a ſhoe-maker's knife in his hand, with which he was cutting the heel of a woman's ſhoe. The deceaſed having finiſhed his thatching, was returning in his way home by the priſoner's houſe. On paſſing the priſoner as he ſat on the bench, the deceaſed called out to him, "Are not you an aggravating raſcal?" The priſoner replied, "What will you be, when you are got from your maſter's feet?" On which the deceaſed ſeized the priſoner by the collar, and dragging him off the bench, they both rolled down into the cartway. While they were ſtruggling and fighting, the priſoner underneath and the deceaſed upon him, the deceaſed cried out, "You rogue, what do you do with that knife in your hand?" and made an attempt to ſecure it: but the priſoner kept ſtriking about, and held the deceaſed ſo hard that he could not diſengage himſelf. The deceaſed however made a vigorous effort, by which means he drew the priſoner from the ground, and during this ſtruggle, the priſoner gave a blow; on which the deceaſed immediately exclaimed, "The rogue has ſtabbed me to the heart; I am a dead man!" and expired. Upon inſpection, it appeared that he had received three wounds; one very ſmall on his right breaſt; another on the left thigh two inches deep, and half an inch wide; and the [illegible] wound on his left breaſt.

The Judges, after great argument and conſideration, determined, That the offence was manſlaughter only.

LAVEY AND PARKER'S CASE.

At the Old Bailey in December Seſſion, 1776, William Lavey and Elizabeth Parker were indicted before Mr. Baron *Hotham*, on the 8th and 9th *Will.* III. cap. 26, § 4, for feloniouſly and traitorouſly colouring with a waſh, and materials producing the colour of ſilver, one round blank of baſe metal, of a fit ſize and figure to be coined into counterfeit milled money, reſembling the ſilver coin of this kingdom called a ſixpence.

The Jury found the priſoners guilty upon very clear and ſatisfactory evidence; but it appeared that the colour of ſilver was produced by melting a ſmall portion of good ſilver with a large portion of baſe metal, and throwing it, after it had been cut into round blanks, into *aqua fortis*, which draws to the ſurface whatever ſilver there is in the compoſition, and makes it aſſume the colour and appearance of real ſilver. A doubt therefore aroſe, Whether this was "colouring with a waſh and materials," within the meaning of the ſtatute? or, Whether the legiſlature did not intend ſuch a colouring only, as is produced by a ſuperficial application?

Upon this doubt the queſtion was referred to the conſideration of the Judges. The words of the act are, "that whoſoever ſhall colour, gild, caſe over with gold or ſilver, or with any waſh, *or materials producing the colour of gold or ſilver*, any coin reſembling any of the current coins of this kingdom, or any round blanks of baſe metal, or of coarſe gold, or coarſe ſilver, of a fit ſize and figure to be coined into counterfeit milled money, reſembling any of the gold or ſilver coin of this kingdom ſhall be guilty of high treaſon." And they were unanimouſly of opinion, That this proceſs of extracting the latent ſilver from the body to the ſurface of the baſe metal by the power of *aqua fortis*, was a colouring within the words, "materials producing the colour of ſilver."

JAMES BOLLAND'S CASE.

At the Old Bailey in February Seſſion, 1772, James Bolland was tried before James Eyre, Eſq. RECORDER, preſent Mr. Juſtice Nares, for forging on the back of a promiſſory note, for the payment of money, drawn by one Thomas Bradſhaw, and indorſed by one Samuel Pritchard, a certain indorſement in the name of *James Banks*, with intent to defraud Francis-Lewis Cardeneaux.—The note was in the words and figures following:

" *L.* 100. *London*, 12 *October* 1771.

" Two months after date, I promiſe to pay to Mr. Samuel Pritchard, or order, one hundred pounds, value received,

" *Charles-ſtreet, Covent Garden.* T. BRADSHAW."

He alſo ſtood charged for uttering and publiſhing as true the ſaid forged indorſement of the name of *James Banks*, knowing the ſame to be forged, with the like intention.

The Jury found the priſoner guilty of uttering and publiſhing the bill, knowing it to be forged; but the Court reſpited the judgment; and it was ſubmitted to the conſideration of the TWELVE JUDGES, Whether, under all the circumſtances of the caſe, Bolland had been guilty of forgery within the meaning of the ſtatute of 2 *Geo.* II. cap. 25.

The following circumſtances appeared in evidence:

Money tranſactions of a very complicated nature, and to a very large amount, ſubſiſted between Bolland and one Pritchard. Bolland had arreſted him for 2,600 l. and obtained a judgment for 1,498 l. 15 s. A Mr. Jeſſon had diſcounted for Bolland a bill upon Pritchard of 52 l. 10 s. but neither Pritchard nor Bolland being able to take it up when it became due, it remained unpaid in the hands of Jeſſon. In the month of October, 1771, Bolland, Jeſſon, and a Mr. Lilburne, met at the George and Vulture Tavern in Cornhill, in a public room. Jeſſon aſked Bolland when he would ſettle the note of fifty guineas: Bolland immediately produced the preſent note for 100 l. drawn by Bradſhaw, payable to Pritchard, and indorſed " *James Bolland*," and aſked Jeſſon to diſcount it. Jeſſon, upon obſerving Bolland's indorſement, told him, that as his name was on the back of

it, he could not negotiate it; that he knew Bradſhaw, and conſidered him as a good man; but that he did not chuſe to put his (Jeſſon's) name on the ſame paper with Bolland's. Bolland replied, "I can take off my name." Immediately Mr. Lilburne took up one of the table-knives, with intention to eraſe all the name; but when he had eraſed all but the initial *B*, for he began at the laſt letter of the name, Bolland ſaid, "Don't ſcratch it all out, for it may diſfigure it, or cancel it by ſcratching a hole in it; I will think of ſome other name that begins with a *B*;" and he immediately filled it up with "*anks*," which made the name *Banks*. When this was done, he returned the note to Jeſſon, who put it into his pocket, ſaying, "I ſhall give it to a particular friend of mine, and he will undoubtedly aſk me who Banks is." To this Bolland replied, "Banks is a publican or victualler, and lives near or in Rathbone Place."

The enſuing day, Jeſſon applied to Mr. Cardeneaux, to get this bill diſcounted. Cardeneaux took the bill, and promiſed to give Jeſſon the money for it on the Friday following. Jeſſon having ſome money to make up, applied to Cardeneaux on the Thurſday, and borrowed 15l. 16s. on the credit of the bill. On the Saturday morning, Bolland applied to Jeſſon, and inſiſted on having the bill returned, or the amount of it paid to him. Jeſſon and Bolland went to a coffee-houſe, and ſent for Cardeneaux. He came, and Jeſſon introduced him to Bolland, as the owner of the bill. Cardeneaux enquired of Bolland who Pritchard the payee, and Banks the indorſer of the bill were. Bolland ſaid, "Pritchard is a man extremely well known; he is a dealer in horſes, and a man of great property. Banks alſo is a man of property; he deals largely in wines and ſpirits, and lives in Rathbone-Place." Cardeneaux told Bolland that it was not convenient to him to give the whole in caſh; upon which Bolland produced another bill of 101. 10s. and Cardeneaux gave him his note for 50l. and a draught upon his banker for 44l. 5s. which, with the 15l. 16s. he had paid before to Jeſſon, and 9s. diſcount, made up the 110l. 10s. for both the bills.

Cardeneaux never deſired Bolland to indorſe the bills; becauſe Jeſſon had told him when he gave him the 100l. bill, that it was better *his* name ſhould not appear upon it, he having been formerly a Sheriff's Officer; and that the bill would not paſs properly at the Bankers with his name on it.

Before the bill came due, both the drawer Bradſhaw and the payee Pritchard became bankrupts. Upon theſe events,

Cardeneaux applied to Jeſſon for a direction to Bolland; and having got it, he ſaid to Bolland, "That bill I diſcounted for you will not be paid." Bolland, with an air of aſtoniſhment, ſaid, "What bill! I never diſcounted a bill with you, Sir. You miſtake me. My name is *James Bolland*. I never ſaw you in my life; and you have no bill with my indorſement on it." And when Cardeneaux inſinuated that he was acquainted with his having altered the name, he treated the idea of its being a forgery with the moſt ſupercilious contempt.

When the bill became due, Bolland refuſed to pay it, and Cardeneaux put it into the hands of a Mr. Morris, in order to obtain the money.

While things remained in this ſituation, Mr. Levi, an Attorney, two of whoſe clients Bolland had deceived, got intelligence from Pritchard of the alteration of the name of "*Bollana*" to that of "*Banks*," and he applied to Cardeneaux to proſecute, to which Cardeneaux conſented. To obtain the note, Levi, by the deſire of Cardeneaux, gave Mr. Morris an undertaking to deliver up, or to be accountable to him for the bill. Levi apprehended Bolland, and on his being committed by Sir John Fielding, depoſited the note with Sir John's Clerk, who produced it at the trial.

After Bolland's commitment, a perſon brought the 100l. to Mr. Cardeneaux, in the name of *James Banks*, and he gave him a receipt, the form of which the perſon brought with him, in the name of *James Banks*, containing a promiſe to deliver up the bill on demand; the bill being then in the cuſtody of the Magiſtrate. But it did not appear that there ever was in fact ſuch a perſon exiſting as *James Banks of Rathbone-Place*.

The opinion of the Judges upon this caſe was never publicly communicated. The principal doubt ſeems to have been, Whether forgery can be committed in the name of a perſon who never had exiſtence?

Bolland was executed at Tyburn on the 18th of May, 1772.

CATHERINE

CATHERINE GRAHAM'S CASE.

At the Old Bailey in February Seſſion, 1772, three men, of the names of Jennings, Birch, and Smith, were tried as principals in ſimple grand larceny, before Sir *James Eyre*, Recorder; preſent Mr. Baron *Smythe*, Mr. Juſtice *Aſhhurſt*, and Mr. Juſtice *Nares*.

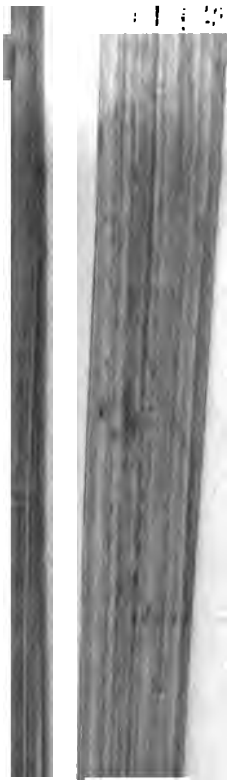
The indictment contained two counts; the firſt of which charged the priſoners above-named with ſtealing *two bank-notes*; and the ſecond charged them with ſtealing *a pocket-book* and other things, the property of James Madden, privately from his perſon.

In the ſame indictment one Catherine Graham was charged as an acceſſary after the fact, at common law, for harbouring and maintaining the principal felons, "ſhe well knowing that the ſaid Jennings, Birch, and Smith, had committed *the felony aforeſaid*." She alſo ſtood charged with receiving the ſaid goods, well knowing them to have been ſtolen.

Birch was acquitted of the whole charge. Jennings and Smith were found guilty of ſtealing, but not privately from the perſon. Catherine Graham was found guilty of concealing and harbouring the principals.

Sir James Eyre ſuggeſted a doubt as to the propriety of the conviction of the acceſſary. The indictment charged the principals with *two diſtinct felonies*; and the acceſſary with harbouring thoſe principals, well knowing they had committed *the felony aforeſaid*. It was therefore uncertain to which of the felonies this charge referred.

THE COURT concurring in this doubt, the judgment was reſpited, and the queſtion ſubmitted to the conſideration of the TWELVE JUDGES. In the June Seſſion following, the judgment was ordered to be arreſted; and the priſoner Catherine Graham was diſcharged.



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Mr. Edwards ſaid, " Sir, if you will go with me to the Weſt end of the town, to Pultney-ſtreet, I will give you the caſh." Mr. Edwards replied, " I cannot conveniently go with you myſelf, but Mr. Croxall ſhall attend you, and pay you the 25s. agency, and the diſcount, on receiving the hundred pounds." On their departure, Mr. Edwards whiſpered his clerk not to leave the priſoner without receiving the money, nor to loſe ſight of him; promiſing to follow them in half an hour. The priſoner and Mr Croxall accordingly proceeded together to the priſoner's lodgings in Pultney-ſtreet. When they arrived, the priſoner ſhewed Mr. Croxall into the parlour, and deſired him to wait while he fetched the money; ſaying, " It is only about three ſtreets off, and I ſhall be back again in a quarter of an hour." Mr. Croxall however followed him down Pultney-ſtreet, but in turning the corner of Brewer-ſtreet loſt ſight of him. He walked backwards and forwards in the ſtreet for a length of time, in hope of ſeeing him return; but without ſucceſs. During this interval Mr. Edwards, who had previouſly called at the priſoner's lodgings, came up to Croxall, and they returned together to the priſoner's lodgings, where they waited three days and three nights in a vain expectation of the priſoner's return. On the Saturday following, however, Mr. Edwards apprehended him at the houſe of a lady in Margaret-ſtreet, where he had dined. He expreſſed his ſorrow for what had happened; made ſeveral apologies for his miſconduct; and promiſed to return the bill; but he was carried before a Magiſtrate, who committed him " *on ſuſpicion of being a common cheat.*" It was proved that the bill had been ſeen a few days before the trial, in a ſtate of negotiation, in the hands of a Mr. Smith, and that a *ſubpæna duces tecum* had been ſerved upon him; but he did not appear, nor was the bill produced in evidence.

The Counſel for the priſoner ſubmitted two points to the conſideration of the Court: 1ſt, That the bill itſelf ought to have been produced in evidence. 2dly, That the facts, admitting them to be true, do not amount to felony.

To the ſecond point, they argued, that, To ſatisfy the definition of larceny, as it appears in the works of the moſt diſtinguiſhed writers upon Crown Law, the *property* muſt be taken from the *poſſeſſion* of another. The taking of the *property* itſelf, after it is once ſeparated from the legal poſſeſſion of its original proprietor, can never become a ſubject of larceny. There is a diſtinction between thoſe actions which are committed *animo furandi*, and thoſe which are the conſequence



ſequence of *artful contrivance*; and this is the great difference between *felony* and *fraud*. The criterion of a *felonious intention* is where the act of taking is accompanied by ſuch circumſtances as plainly import it to have been by *conſtraint*, and *againſt the inclination* of the owner. But where the mind of the owner is beguiled by the means of ſome deceitful practice, and under the influence of that deceit he conſents, fooliſhly perhaps, but *voluntarily*, to part with his property, it is evidence of a *fraudulent intention*; but whether in this caſe the *poſſeſſion* accompanies the *delivery* or not, it will be impoſſible to build upon ſuch a foundation the notion of larceny, which requires that the goods ſhall be obtained againſt the owner's conſent.

The COURT left the caſe with the Jury to conſider, *firſt*, Whether they thought the priſoner had a preconcerted deſign to get the note into his poſſeſſion, with an intent to ſteal it? And, *ſecondly*, Whether the proſecutor intended to part with the note to the priſoner, without having the money paid before he parted with it; They found the affirmative of the firſt queſtion, and the negative of the ſecond; and concluded that the priſoner was therefore GUILTY.

The judgment was reſpited, and the following queſtions referred to the conſideration of the TWELVE JUDGES.

Firſt, Whether as the bill in queſtion had not been produced, the parole teſtimony which had been given concerning it was legally received?

Secondly, Whether the priſoner was guilty of FELONY, under all the circumſtances of this caſe?

The JUDGES were unanimouſly of opinion, That the parole teſtimony had been properly received; and as the Jury had found a pre-concerted deſign in the priſoner to ſteal the note, he had been legally convicted of felony, and he received ſentence of tranſportation accordingly.

THE

THE

LAWYER'S

AND

MAGISTRATE'S MAGAZINE.

For AUGUST 1790.

Adjudged Caſes in the Courts at Weſtminſter in the late Term.

BUTCHER'S COMPANY *v.* MOREY.

IN the year 1750, the Butchers within the City of London and ſuburbs thereof, and within two miles of the ſame, were incorporated by Letters Patent, with full power and authority to appoint, from time to time, ſuch reaſonable ordinances, decrees, orders, and conſtitutions, which to them, or the major part of them, ſhould ſeem to be good, wholeſome, profitable, honeſt, and neceſſary, for the good order and government of the Maſter, Wardens, &c. and of *all other perſons* for the time being, exerciſing or uſing the ſaid art or myſtery of butchers, or *expoſing fleſh to ſale* within the City of London, and for declaring in what manner the ſaid Maſter, &c. and *all perſons uſing the art, &c.* or *expoſing fleſh to ſale* within the ſaid City, and within two miles thereof, in their offices, ſervants, and trades ſhould behave, bear, and uſe themſelves for the public good and common benefit of the ſaid Maſter, &c. and in all caſes and things whatſoever, touching or in what manner ſoever concerning the art or myſtery, &c. and as often



often as they ſhould make, conſtitute, &c. ſuch inſtitutions, ordinances, orders, and conſtitutions, ſhould make, limit, and provide, ſuch pains, penalties, and puniſhments, by impriſonment of the body, or by fines and forfeiture, or by either of them, againſt and upon *all offenders* againſt ſuch laws, as to the ſaid Maſter and Wardens, &c. ſhould ſeem neceſſary. In conſequence of which a bye-law was duly made as follows: "Whereas the Lord's day was by Chriſtians to be kept holy, it was ordained that *no perſon* then uſing, or who ſhould thereafter uſe the ſaid art, and ſhould dwell within the ſaid city, or within two miles of the ſame, ſhould keep open any ſhop, or *offer to ſale* any freſh meat upon the ſaid day: and that *every ſuch perſon* who ſhould offend, contrary to any part of that ordinance, ſhould forfeit and pay to the ſaid Maſter, &c. for the firſt time 20*s.* for the ſecond time 40*s.* and for every time afterwards 3*l.*"

An action had been brought againſt the defendant, who exerciſed the trade of a butcher in *Mint-Street, Southwark*, being within two miles of the City, for divers penalties incurred under this bye-law, for ſelling meat on the Lord's day. At the trial a verdict was found for the plaintiffs.

Now, upon a rule to ſhew cauſe why judgment ſhould not be arreſted, the queſtion came before the Court, whether the Corporation ſo conſtituted without the authority of Parliament, could make bye-laws, binding upon perſons *not* members of the Company, which the defendant was not?

LORD LOUGHBOROUGH.—I can ſee no good ground of objection to this bye-law itſelf, nor to the ſubject matter of it. It is a regulation made in affirmance of the general ſtatute law of the kingdom, 29 *Ch.* II. cap. 7, which prohibits buying and ſelling on the Lord's day. The Butcher's Company have affixed a penalty on perſons exerciſing the trade of butchers, who ſhall ſell meat on that day, and have increaſed the penalty in proportion to the firſt, ſecond, and third offence. The objection raiſed is, that the authority by which theſe regulations are made, is defective, becauſe, it is contended, it can only extend to thoſe perſons who are members of the Company. It is alſo ſaid, that though large corporations, and thoſe which are eſtabliſhed for the general purpoſes of local government have a right to bind by their laws all perſons within the limits of their juriſdiction, yet that a private particular corporation like the Butcher's Company, can have no right to affect any perſon but their own members. But no caſe was cited which ſupports this poſition. I agree, that ſtrangers and they who

are not concerned in the trade, for the regulation of which the Company was eſtabliſhed, cannot be bound by the laws of that Company: if this bye-law had inflicted a penalty on the *buyers* of meat, I ſhould hold it to be clearly bad, becauſe they are perfect ſtrangers. It is an object of public policy that the exerciſe of certain trades ſhould be under the regulations of particular bodies; charters have various effects according to the ſubjects of them. Some are granted with excluſive rights to particular perſons: others contain rules which only affect certain members. On principles of general policy the object of the law is, that by means of charters of this kind, the power of carrying on trade, of making up goods, of expoſing them to ſale, and the like, ſhould belong to the local government of particular diſtricts. For theſe purpoſes, certain reſtraints are impoſed, ſince every regulation is more or leſs a reſtraint. Now if in the preſent inſtance, the Butcher's Company had no power to regulate their own trade, ſo as to make laws binding on perſons who exerciſe that trade, as well thoſe who were not members of the Company, as thoſe who were; the conſequence would be, that the beneficial purpoſe of the charter would be entirely defeated, and the only perſons injured by the reſtraint would be the members themſelves. For then all other perſons might carry on the trade without controul, while the members of the Company would be excluded, and the whole buſineſs of ſupplying meat on *Sundays*, would fall into the hands of the butchers not of the Company. But this would be contrary to the intent of the charter. I think this caſe caſe comes within the principle of the *Exeter* caſe, (*Pierce* v. *Bartrum*, *Cowp.* 269, where a bye-law to prevent butchers ſlaughtering within the City, was held to bind the defendant, though not a member of the Corporation); and therefore the judgement ought not to be arreſted.

GOULD, J.—The only difference between this and the *Exeter* caſe is, that there the regulations were confined to the City of *Exeter*, but here the limits extend beyond the boundaries of the City of *London*. But where a charter is granted to a Company in affirmance of an Act of Parliament, made for the purpoſe of common decency and piety, it is fit that the limits of the charter ſhould be as extenſive as the miſchief to be remedied. If the charter were confined to the City itſelf, perſons who pay no regard to the law might eaſily go out of the limits preſcribed, and buy meat; by which means the purpoſe of the charter would be de-

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shall prevent him [illegible]

MILLS *v.* AURIOL.

This was an action of covenant againſt a bankrupt for a quarter's rent accrued ſubſequent to the aſſignment of his leaſe to the aſſignees of the bankruptcy.

To the defendant's plea, that before any part of the money in the declaration mentioned, became due and payable, he became bankrupt, and the leaſe in queſtion, together with other effects, was duly aſſigned and ſet over to the aſſignees of the ſaid bankruptcy, there was a general demurrer; which was argued much at large, the ſhort queſtion being, whether, the leaſe, and all the bankrupt's intereſt, being veſted in the aſſignees under the commiſſion, he is diſcharged from an expreſs covenant?

LORD LOUGHBOROUGH.—There is no degree of doubt but that the law is eſtabliſhed, that an action of *covenant* may be brought on a covenant to pay rent, though the leſſee be not in poſſeſſion of the land, and after acceptance of rent from the aſſignee by the leſſor. This is by privity of contract: but the diſtinction is clear between *debt* and covenant. Then when the term is taken under the aſſignment of commiſſioners of bankrupt, the queſtion is, whether it is not by the act of the bankrupt himſelf? It is taken from him becauſe he has contracted debts, and inſtead of any ſingle creditor ſuing out a *fieri facias*, the common law execution, there being many creditors they join in taking out a commiſſion of bankruptcy, which is in the nature of a ſtatute execution. By this the property is veſted in the aſſignees, but not ſo abſolutely as in the vendee by a ſale under a *fieri facias* made by the Sheriff; becauſe if the effects were ſufficient without it, the term would remain to the leſſee. Covenant they may well be brought againſt him. Though he is out of poſſeſſion, yet he is placed in that ſituation by his own act. I am therefore of opinion that the judgment ought to be for the plaintiff.

WILSON, J.—The plea of the defendant is not ſupported by any adjudged caſe. It has never yet been decided that an action of covenant would not lie upon a covenant by a leſſee which runs with the land, and which was entered into before, but broken after the bankruptcy of the covenantor. I entertained no doubt on this queſtion, except what aroſe from the hints thrown out by ſome of the Judges of the Court of King's Bench, whenever the queſtion has come



come before them, on account of the dictum of Mr. Juſtice *Yates*, in *Mayor* v. *Steward*, (1 *Bur.* 2439), that as the bankrupt is diveſted of his whole eſtate, and rendered incapable of performing the covenants, it would be a hardſhip upon him if he ſhould ſtill remain liable to it, when he is diſabled by the Act of Parliament from performing it. But this opinion was clearly extra-judicial, for under the circumſtances of that caſe, the Court held the plea to be bad. In *Wadham* v. *Marlow*, (*Cooke's* B. L. 518), Lord *Mansfield* ſpoke of the opinion of Mr. Juſtice Yates as deſerving great weight, though it was extra-judicial. But in that caſe it was not ſtated that the plaintiff had accepted rent from the aſſignee as his tenant, and it was contended that debt as well as covenant would lie againſt the leſſee, becauſe the leſſor had done no act to ſhew his aſſent to the aſſignment. But the Court decided, on the ground that the plaintiff had virtually aſſented to the aſſignment, every man's aſſent being implied to an Act of Parliament, and not on the ground that an action of debt would not lie. And in *Ludford* v. *Barber*, the Court gave judgement for the defendant, becauſe the covenant declared upon had never been entered into by him with the plaintiff. Thus the queſtion ſtands with reſpect to judicial deciſions. The ſeveral ſtatutes relating to bankrupts, prior to the 4 *Anne*, cap. 17, left the bankrupt not only liable to all contingent debts, but to the remainder of the debts which his effects had been unable to ſatisfy. The hardſhip was the ſame, for the bankrupt was deprived of his all, and yet left without any protection againſt his creditors. The ſtatutes previous to that time, meant to give an execution for the equal benefit of all the creditors, and if they were not fully ſatisfied by it, to leave them for what was unſatisfied, to every remedy againſt the bankrupt which they had before. Neither that ſtatute, nor the now exiſting ſtatutes upon the ſubject, extend to this caſe. The 34 *Hen.* VIII. cap. 4, directs that the Lord *Chancellor* and other great officers ſhall have power to ſell and diſpoſe of the lands and goods of bankrupts in as full a manner as the bankrupt himſelf might have done. Subſequent ſtatutes have empowered the aſſignees to make the ſame diſpoſition. The intent of theſe ſeveral ſtatutes was, that the act of the aſſignees ſhould do no more than the act of the bankrupt himſelf. I therefore do not ſee how the maxim "*In jure non remota ſed proxima ſpectantur*," is applicable. The Act of Parliament only aſſigns the intereſt of the bankrupt in the land, but does not deſtroy the privity of contract between leſſor and leſſee. An action of

nant remains after the eſtate is gone; but, generally ſpeaking, when the land is gone, the action of debt is alſo gone, debt being maintainable becauſe the land is debtor. Covenant is founded on a privity collateral to the land. A covenant of this kind is mixed, it is partly perſonal and partly dependant on the land, it binds both the perſon and the land. This brings the caſe within the principle of *Mayor* v. *Steward*.

Judgement for the Plaintiff.

ARTHRINGTON *and* HERDCASTLE *v. the* BISHOP *of* CHESTER *and* JACKSON, *Clerk.*

This was a queſtion reſerved at the York Aſſizes for the opinion of the Court, whether the right of preſentation to *the perpetual Curacy* of the Church of *Coverham*, in the dioceſe of Cheſter was in the plaintiffs, or belonged to the King who had then lately preſented the defendant *Jackſon* to the ſame. On the trial at the Aſſizes, a verdict was found for the plaintiffs.

CASE.

In the reign of *Hen.* III. the rectory of Coverham was appropriated to the abbey of Coverham, and from that time to the time of the diſſolution of the abbey, the pariſh church of Coverham was ſerved either by ſome of the monks, or by ſome perſon whom they employed, there *not appearing to have ever been a vicarage endowed.*

Upon the diſſolution of the abbey, 27 *Hen.* VIII. the ſame with all its members and appurtenances came to the Crown, and continued in the Crown till *Ed.* VI. by letters patent granted the ſame to John Ward for 21 years, reſerving a rent of 20*l.* In this grant there is the following exception: "Exceptis tamen ſemper nobis heredibus et ſucceſſoribus noſtris omninò reſervatis, omnibus boſcis et ſuboſcis, de in et ſuper præmiſſis creſcentibus et exiſtentibus, ac advocat vicariæ eccleſiæ de Coverham prædictæ habendum et tenendum."

Queen Elizabeth, by letters patent in the 14th year of her reign, after reciting the above grant of *Ed.* VI. in conſideration of 853*l.* 12*s.* granted to Thomas Allen and Thomas Freeman a reverſion of the ſame, together with the whole



[illegible]
"[illegible]
"[illegible]
"[illegible]

During the time of [illegible]
the Crown, an annual pen[illegible]
Crown to the perfon [illegible]
time being of the parish [illegible]

There was a vicarage at [illegible]
grant of Queen Elizabeth [illegible]

In 1642, Thomas Dick[illegible]
racy of Coverham, on the [illegible]
caſtle and Thomas Horner, [illegible]

In 1691, Thomas Oddie [illegible]
of Coverham, but it [illegible]

Between the years 1691 [illegible]
ceaſed to ſerve the curacy [illegible]

In 1708, the firſt John [illegible]
tory and vicarage of Coverha[illegible]
Anne, patron *pro hac vice* [illegible]

In 1727, on the ſuppoſed [illegible]
Humphry Dickinſon was inſ[illegible]
ham on the preſentation of [illegible]
That Turner afterwards ap[illegible]
upon which Dickinſon gave [illegible]

In 1737, while the ſaid [illegible]
church, Chriſtopher Lord[illegible]
of Coverham by Thomas [illegible]
impropriators.

that in the grant, after the demiſe of the rectory, there is an exception of all woods, underwoods, and a demiſe of the advowſon of the vicarage of the church of Coverham: that the reverſion expectant on that term for years was ſold by Queen *Elizabeth* to Allen and Freeman. The letters patent of *Eliz.* are ſet forth, which begin by reciting the former demiſe, and then the Queen grants the reverſion of the rectory, with the appurtenances as before ſpecified in the patent and the demiſe for years. After this, there is a grant of the whole rectory, with a very ample deſcription and all general words of grant, which concludes with granting it to Allen and Freeman in as full a manner as it was poſſeſſed by any abbot of Coverham. This undoubtedly grants expreſsly more than was contained in the terms of the demiſe to Ward, becauſe it directly grants the woods and underwoods which were excepted out of the demiſe to Ward. It then mentions a grant of the rectory of Iford, in the county of Suſſex; and at the cloſe there is an exception of all advowſons of the rectories, vicarages, and churches belonging to the premiſes. The caſe goes on to ſtate, that there was a vicarage belonging to the rectory of Iford, but none to the rectory of Coverham; but during the time the rectory of Coverham remained in the Crown, an annual ſtipend of 5*l.* 6*s.* 8*d.* was paid by the Crown to the Curate. It is then ſtated, that Thomas Dickenſon was admitted to the curacy in 1642, on the nomination of the grantees; that in 1691, one Oddie was licenſed by the dioceſan to ſerve the curacy; that afterwards one Turner was licenſed in the ſame manner, and that the ſame Turner, in 1708, was inſtituted to the rectory and vicarage of Coverham, on the preſentation of Queen *Anne* by lapſe. The caſe next ſtates, that in 1727, on the ſuppoſed death of Turner, one Dickenſon was inſtituted to the vicarage of Coverham, on the preſentation of King *George* I. *pleno jure*, that afterwards Turner, who was not dead, nor had made any avoidance of the living, appeared, and claimed the church, upon which Dickenſon gave it up: that in 1737, one Lonſdale was nominated to the curacy by the impropriators, while Turner was in poſſeſſion, who was afterwards diſpoſſeſſed by proceſs in the Conſiſtory Court of Cheſter; and that by the death of Lonſdale there is now an avoidance.

On this caſe the queſtion for the determination of the Court is, what paſſed by the grant of Queen *Elizabeth*, to the perſons under whom the preſent parties claim? For if all the intereſt in the rectory paſſed, the curacy which is incident to the rectory, (I rather call it incident than ap-

purtenant) undoubtedly paſſed along with it. It is contended on the part of the plaintiffs, that on the true conſtruction of the grant, no exception can be intended of the curacy; and that if ſuch exception had been inſerted in the grant, it would have been void, as repugnant to the grant itſelf, becauſe the rector of a rectory impropriate, where there is no vicarage endowed, and no perpetual curacy, is obliged by law to find a curate to ſerve the church, and give him a reaſonable allowance. He may make the beſt terms he can; but that it is the duty of the biſhop by eccleſiaſtical cenſures, to compel the performance of the duty for the ſake of the church. That queſtion would lead pretty far; but it is immaterial to enter into the conſideration of it, if on a thorough view of the grant, together with the facts of the caſe, there is no reaſon to ſay that the curacy was excepted. *That* to us appears to be the true conſtruction, and confirmed by the uſage. The grant of *Elizabeth* begins, as I before ſtated, with a recital of the demiſe to Ward; but it would not be juſt to conclude that it meant to give no more. It is manifeſt that Ward had not all which the grantees afterwards had, becauſe there is an expreſs reſervation in the demiſe to him of a part which they enjoyed. He was to have the profits of the rectory, paying a rent of 20*l. per annum* during the term; but the tranſaction with Allen and Freeman was for an abſolute ſale at a large price paid. The grant does not ſtop ſhort; it was neceſſary to recite the term, becauſe it was a grant in fee, and the purchaſer under the Crown acquired a right during the remainder of the term to the rent. It therefore begins with giving to the grantees the reverſion after the term for years, and goes on in explicit and diſtinct words, granting this and all other commodities and emoluments whatever belonging to the rectory parcel of the poſſeſſions of the abbot of Coverham; it mentions expreſsly the woods, underwoods, and trees, and cloſes a very long recital of the particulars with the words "in as ample a manner and form as any abbot of the abbey of Coverham had poſſeſſed and enjoyed the ſame." The general exception which follows, was to prevent dilapidations, which were at that time very common, to the deſtruction of churches. In the exception of the vicarage it is perfectly clear that the nomination to the curacy is not in terms included. Yet it is argued, that in a grant of the crown which is to be favourably conſtrued, the Court would extend the meaning to a reſervation of the nomination to the curacy, if the words of the grant could juſtify that extenſion to be made. But the words of this

grant hardly juſtify ſuch an extenſion. If there had been an exception of the advowſon of a vicarage ſpecifically named in the grant of the rectory of Coverham, the argument would have had this ground to ſtand upon, namely, that ſomething muſt be meant to be excepted, that as in reality (there being no vicarage at Coverham) the only nomination which could be made, was to the curacy, it muſt be implied that the curacy was meant, though improperly deſcribed as a vicarage. But that is not the caſe. The words in the grant are general and ſufficiently anſwered, if there be a vicarage belonging to either of the livings. Now to one of the livings, to Iford, there is a vicarage belonging. That fully ſatisfies the words of the exception. They are not nugatory words, and it is not *neceſſary* in the conſtruction of them that there ſhould be an intention in the grant, to make any exception whatever relative to the rectory of Coverham. Beſides this, there are ſubſequent words in the grant, which I think go pretty far to ſhew that this could not be the intention. For there is a proviſion on the part of the Crown, to indemnify the purchaſers from all burthens, charges, and rents which might be iſſuing out of the object of the grant, and a particular exemption from the payment of a penſion of 4*s. per annum*, payable out of the rectory of Iford to the vicar. Now the nomination to that vicarage being intended to be reſerved to the Crown in the general mention which is made of all burthens iſſuing out of the things granted, the payment of this annual ſtipend to the vicar of Iford is particularly noticed. But there is no exemption from the payment of any allowance to be made to the curate. The effect therefore of the grant would be, according to the argument, to make the grantee of the rectory ſubject in the law to payment of the curate without giving him the power of nomination; and we ſhould intend a reſervation ſevering the nomination to the curacy from the fund, out of which the proviſion for the curate muſt come. This would be certainly contary to good policy, and productive of miſchief, by making it queſtionable who was to maintain the curate, and leaving the Eccleſiaſtical Court deſtitute of means to compel ſuch maintenance, by ſequeſtering the profits of the living. The curate alſo would be left without having any reſort to the perſon by whom he was nominated, for a proviſion for his ſubſiſtence. It is too much therefore to contend, as the defendant does in this caſe, without ſpecial words, that a reſervation ſhould be made by intendment out of the general



words of the grant, when there is no part of the ſubject matter, nor any thing in the nature of the caſe, which would tend to induce ſuch an intendment, and when reaſon and policy are againſt it. If this intendment were to hold, then the queſtion would ariſe, which was argued with a great deal of force, but which it is not neceſſary now to enter into, whether ſuch a reſervation could be made? The uſage, it is ſaid, ſtands very looſely on behalf of the impropriators. But it is certainly in their favour. The firſt nomination, of which there is an account, was made by the impropriators. How the next perſon was appointed does not appear. The nomination of Turner which followed, which is the firſt exerciſe of the right of the Crown, is ſtated to have been by lapſe, from which it is to be preſumed, that the Crown had no original right to nominate. The next preſentation of Dickenſon in 1727, is ſtill leſs in favour of the right of the Crown, becauſe it was clearly made, on complete miſ-information. There was no vacancy, no avoidance; and Turner had ſtill the title to the living. It muſt have been made on a ſuppoſition either that he was dead, or that there was an avoidance by ſome other means. It was a preſentation granted by the Crown in a caſe, which neither intitled the Crown, nor any one elſe. Turner appeared, and Dickenſon gave up the church to him, and he reſumed the poſſeſſion. While Turner was ſo in poſſeſſion, the impropriators nominated Lonſdale, and on a ſuit in the Conſiſtory Court, the Biſhop of Cheſter affirmed their right to nominate, and Turner was in conſequence diſpoſſeſſed, which would not have been, if the right had been in the Crown. All therefore that we know of the enjoyment of the right of nomination to this curacy, from the time of the grant down to the preſent time, is, as far as it goes, in favour of the plaintiffs, and there is no inſtance of a clear right of nomination on the part of the Crown. It is for theſe reaſons we are of opinion that there ought to be

Judgment for the plaintiffs.

STORY

STUDD *v.* ACTON.

This was an action on the caſe on the ſtat. 23 *Hen.* VI. cap. 9, againſt a ſheriff for refuſing to take bail on an attachment out of Chancery. The declaration in ſubſtance was as follows: Nathaniel Lee Acton, Eſq. late Sheriff of the county of Suffolk, was attached to anſwer to James Studd, in a plea of treſpaſs on the caſe, and thereupon the ſaid James complains: for that whereas by a certain Act made in the 23d year of the reign of King Henry VI. it was amongſt other things enacted, that all Sheriffs ſhould let out of priſon all manner of perſons by them or any of them arreſted, or being in their cuſtody, by force of any writ, bill, or warrant, in any action perſonal, or by cauſe of indictment of treſpaſs, upon reaſonable ſureties. And whereas one John Revett proſecuted out of the Court of Chancery, a certain writ of *attachment*, directed to the Sheriff of Suffolk, by which ſaid writ the King commanded the ſaid Sheriff to attach the ſaid James and Elizabeth his wife, and one James Reilly and Elizabeth Cotton, ſo as to have them before the ſame lord the King in his Court of Chancery in eight days after St. Hilary; which ſaid writ the ſaid John Revet delivered to the ſaid Nathaniel Lee, in due form of law to be executed; by virtue of which ſaid writ, the ſaid Nathaniel Lee, ſo being ſuch Sheriff as aforeſaid, took and arreſted the ſaid James Studd and Elizabeth his wife: and the ſaid James Studd, immediately after the taking and arreſting of them, they the ſaid James and Elizabeth his wife, tendered to the ſaid Nathaniel Lee reaſonable ſureties of ſufficient perſons, for the appearance of them the ſaid James and Elizabeth his wife, according to the command of the ſaid writ. Nevertheleſs the ſaid Nathaniel Lee, not regarding the ſaid ſtatute, but wrongfully intending unjuſtly to injure, aggrieve, and oppreſs the ſaid James Studd, and to put him to great trouble and expence in this behalf, abſolutely refuſed to accept of any bail or ſureties for them, carried them to the common gaol in the ſaid county, and them then and there kept and detained priſoners, for the ſpace of 10 days, againſt the form of the ſtatute in ſuch caſe made and provided; wherefore the ſaid James Studd ſaith, he is injured and hath ſuſtained damages to the value of 1000*l.*

The queſtion now came to be argued upon a demurrer, whether the Sheriff is bound to take bail upon an attachment out



out of *Chancery*—and it was contended in ſupport of the demurrer, that the ſtatute of *Hen.* VI. is confined to proceſs from the courts of common law, and does not extend to proceedings iſſuing out of a Court of Equity.

LORD LOUGHBOROUGH.—We have taken this caſe into full conſideration, and have conferred with the other Judges on the ſubject, and the reſult is, that we are all of opinion that the action as laid cannot be maintained. It being the caſe of proceſs iſſuing out of the Court of Chancery, we think that it does not come within the ſtatute 23 *Hen.* VI. cap. 9, which directs that the Sheriffs ſhall let all perſons out of priſon by them arreſted, or being in their cuſtody "by force of any writ, bill, or warrant in any action perſonal," which words are confined to actions at law. A ſubſequent ſtatute, 13 *Car.* II. ſtat. 2, cap. 2, which was made on the ſame ſubject, is diſtinctly confined to actions in the King's Bench and Common Pleas, and it does not appear to have been the intent of the Legiſlature to interfere with the proceſs of a Court of Equity. It is extremely clear that the uſage has been for the Sheriff to take a bail-bond in 40*l.* on an attachment, and it is ſo laid down *Darby* v. *Lawſon*, *Eq. Ca. Abr* 351. But it does not appear that he is obliged to take it by the ſtatute. The firſt proceſs in the Court of Chancery is a *ſubpœna*, and if the party does not appear, then an attachment of contempt iſſues. If on this attachment he cannot be taken, and the Sheriff returns *non eſt inventus*, they go on to a ſecond attachment, and if the party be not taken on that, the next proceſs is a commiſſion of rebellion. On this the Commiſſioners ought in all caſes immediately to bring the party up into Court. There is an inaccuracy therefore of expreſſion in *Harriſon's Chanc. Prac.* where it is ſaid that the Commiſſioners ought to take bail, and not keep the party lingering in priſon in their houſes. They certainly have no right to keep the perſon arreſted in priſon: their duty is to bring him up without delay, to the Court of Chancery. There are caſes indeed where they may not take bail. But in the preſent caſe, if the Sheriff has done wrong, it is for that Court to interfere, out of which the proceſs came. I do not mean to ſay, that there are no caſes of this kind, where it would be right for the Sheriff to take bail; but the queſtion for us to determine is, Whether he is bound to do it by the ſtatute? And for the reaſons I have ſtated, we are all of opinion that he is not bound to do it, and therefore there muſt be

Judgement for the defendant.

CROWN CASES.

STONE'S CASE.

Old Bailey July Seſſions, 1784. This was an indictment on the ſtatute 10 and 11 *Will.* III. cap. 23, for privately ſtealing a watch, the property of Sir Robert Heſkett, in the ſhop of John Alcock.

Sir Robert Heſkett had ſent his watch to his watchmaker, Mr. Alcock, for the purpoſe of being repaired, and it hung in the ſhew-Glaſs in Mr. Alcock's ſhop at the time it was ſtolen.

The COURT ſaid, that the meaning of the act of parliament upon which the capital part of the indictment was founded, had always been reſtrained to ſuch goods only, as are expoſed to ſale in ſhops: and did not extend to mere *repoſitories* for goods, although they might appear in the nature of *ſhops*; and that as Mr. Alcock's ſhop was not, with reſpect to this watch, *a place of ſale*, but a mere *repoſitory*, the priſoner ought to be accquitted of the capital part of the charge. The Jury accordingly found him guilty of the ſimple larceny only, and he was tranſported for ſeven years.

GEORGE DRUMMOND'S CASE.

At the Old Bailey in September Seſſion, 1784, George Drummond was indicted before Mr. Baron *Eyre*, preſent Mr. Juſtice *Gould*, for robbing the earl of Claremont of a gold watch, chain, ſeals, and trinkets.

During the trial, the priſoner's Counſel informed the Court, that a young man of the name of Edwards, very much reſembling the perſon of the priſoner, had been recently executed for a highway robbery, and that immediately previous to the awful moment of his fate, he had communicated *ſomething* to the Rev. Mr. Villette, the Chaplain in Ordinary of the Priſon, touching the commiſſion of the identical robbery then under conſideration. He therefore ſubmitted to the Court, that as Mr. Villette's knowledge upon this ſubject had proceeded from *the ſolemn declaration of a dying man*, it was admiſſible evidence in favour of the priſoner.

THE COURT.—It would be inconſiſtent with the rules of evidence, which are rules of Juſtice, to examine a witneſs to the declaration of a perſon dying under the circumſtances deſcribed. The principle upon which this ſpecies of evidence

is



[illegible], Sittings after Trinity Term, [illegible].

[illegible], *Esq.* against the Hon. William [illegible], *for criminal conversation with plaintiff's Wife.*

This was an action of damages against the defendant for having debauched and debauched the plaintiff's wife. The damages were laid at [illegible].

Mr. [illegible], *counsel for plaintiff*, stated that Mr. [illegible] was a nobleman of high rank and family, and pre-eminently [illegible] in the United States, after a member of Parliament [illegible] fourteen years ago, he married Miss [illegible], his present wife, then a young lady, the only daughter and heiress of Mr. [illegible], in Worcestershire, a gentleman also of very large fortune.

From the year of their marriage, 1790, until the time when the injury was done by Mr. [illegible], no two persons could live on a more affectionate or greater harmony than Mr. and Mrs. [illegible]; he had not the smallest cause of jealousy, and treated her with the most tender affection.

In the year 1[illegible], the defendant came to the parish of [illegible], in which Mr. [illegible] resided, in the character of a curate; he was the son of a respectable gentleman, the younger son of a family in Staffordshire. Under these circumstances he was likely to be treated with attention and politeness; he was accordingly introduced into the family, and became intimate with the plaintiff; and being in a poor state of health, which [illegible] weather was bad he was constantly accommodated with a bed in the plaintiff's house, and was treated with every attention, and as a proper friend to take care of his house; but it should seem that [illegible] had [illegible], for [illegible] Mr. [illegible] and Mrs. [illegible], from the facts which I am about to state.

About the middle of June last, Mrs. [illegible] proposed upon her husband to go on a party of pleasure to [illegible], which is about [illegible] from Mr. [illegible]'s house; it was consented to Mr. [illegible] by her husband, that the distance was too great to go with their own horses, and therefore that it would be better to take post horses. Mr.

[illegible]

Cecil complied with the requeſt.—He, Mrs. Cecil, and Mr. Edward Sneyd, the defendant's brother, ſet out for Birmingham;—Mr. Cecil returned back to Hanbury alone, in the evening, and Mrs. Cecil was to have followed him, in company with Mr. Edward Sneyd.

When Mrs. Cecil had remained out much longer than her huſband expected, he began to be anxious about her, but had no idea of what was going forward; and as ſhe did not return, he made what enquiries he could, but could not find her out; and this enquiry was made more difficult, by Mrs. Cecil and Mr. Sneyd aſſuming fictitious names.

The moment that Mr. Cecil had diſcovered that his wife had eloped, he left his houſe, and has never ſince returned to his friends, and now reſides ſomewhere beyond the ſeas.

Mr. Sneyd and Mrs. Cecil were afterwards diſcovered to be at an hotel at Exeter, under the name of *Mr. and Mrs. Benſon*, and then at an obſcure village in Devonſhire, where they lived three or four months in lodgings; they then quitted that place, and came to London, where they now reſide;—in ſeparate lodgings, indeed—but viſit each other every day.

You, Gentlemen of the Jury, will feel the nature of this ſort of injury. You ſee the ſituation of the parties, and the rank of Mr. Cecil, and the neceſſity of his taking care that no ſpurious iſſue be impoſed on his family. You will attend to the evidence which I ſhall now lay before you, and give ſuch a compenſation in damages, as ſubſtantial juſtice requires.

EVIDENCE FOR THE PLAINTIFF.

William Wells ſworn.

Mr. Wells. This is a true copy of the regiſter of the marriage of Mr. and Mrs. Cecil. They were married on the 23d of May, 1776, at St. George's, Hanover-Square.

William Janſey ſworn.

William Janſey. I lived as butler with the plaintiff, near four years and a half.

Q. During that time, had you any opportunity of obſerving how he treated his wife?

A. I always thought he was a very good huſband; they appeared to live very happily together, and he treated her with tenderneſs and affection.

Q. Did you know Mr. Sneyd, the defendant?

A. I

A. I did; he was the Curate of Hanbury. He was Curate there when I came to Mr. Cecil, and continued until the month of June, 1789.

Q. Did he viſit in your maſter's family?

A. Yes, Sir, frequently.

Q. Did he ever ſtay all night at your maſter's houſe?

A. Sometimes he did; he was ſometimes there at ſupper; and in bad weather he ſlept there frequently.

Q. Do you remember your maſter and miſtreſs going to Birmingham?

A. I remember Mr. and Mrs. Cecil going to Birmingham in June, 1789.

Q. When did Mr. Sneyd leave Hanbury?

A. About the end of May, or the beginning of June, 1789.

Q. How far is Birmingham from your maſter's houſe?

A. About eighteen or twenty miles.

Q. When did your maſter return from Birmingham?

A. He came home the ſame night, but Mrs. Cecil did not come home with him.

Croſs-examined by Mr. Erſkine.

Q. At what time did you ever obſerve, in the time from the month of June, 1785, when you came into this ſervice, until May, 1789, when Mr. Sneyd left Hanbury, any aſſiduity of Mr. Sneyd towards Mrs. Cecil, or of Mrs. Cecil towards him?

A. They were frequently walking out together; they were fond of fiſhing.

Q. Your maſter knew this of courſe?

A. I ſuppoſe ſo. Mr. Cecil was ſometimes with them; but they were often together by themſelves.

Q. Mr. Cecil knew that Mr. Sneyd and Mrs. Cecil went on thoſe fiſhing parties together? he knew they were ſecreted a good deal together, and uſed to be in private?

A. He knew they uſed to walk out together in the fields;—I do not believe that he knew they uſed to be in private together.

Q. Did not the plaintiff know that Mr. Sneyd and Mrs. Cecil uſed to be often together; and was it not the conſtant courſe for two years?

A. They were very often alone.

Q. Do you remember Mr. Cecil's going away and leaving his houſe?

A. I do.

Q. Do

Q. Do you recollect what paſſed there before his leaving the houſe?

A. I do not.

Q. Had not Mr. Sneyd left Hanbury, and gone to Birmingham, in the month of May, 1789?

A. I believe it was in May or in June.

Q. Do you remember his being delirious in a fever?

A. I do.

Q. When was that?

A. About a week before he left Hanbury.

Q. Has he recovered from that delirium?

A. I know not; I have ſeen him ſince, and he looked well—I never ſaw him look better than when I ſaw him laſt.

Q. What did you mean? You ſaid, firſt that this gentleman was delirious in a fever; then I aſked you, whether he was recovered? You ſaid you did not know; and then you ſaid, you knew he was well, with the greateſt unconcern in the world---Look to the Jury, Sir---You ſay you never ſaw him look better?

A. By his look, and his face, and his freſh colour, he ſeemed to be well.

Q. Did you happen to know, from your maſter, the converſation that took place between the unhappy gentleman and him, previous to the time of his leaving his houſe?

A. I do not.

Q. Has Mr. Cecil never told you that he had no ſuſpicion, and that he did not know any thing of any infidelity in his wife, until this gentleman himſelf (the defendant) told him of the ſituation he was in with his wife, which was the cauſe of his leaving Hanbury?

A. I do not know.

Q. Do you mean to ſwear, Sir, that you never heard this circumſtance mentioned in your preſence; that the firſt time your maſter heard of any attachment between your miſtreſs and Mr. Sneyd, was when he came to Mr. Sneyd's ſick-bed, and when he told him of it with tears in his eyes?

A. I was not in the room.

LORD KENYON.---Did you ever hear your maſter ſay any thing about it?

A. I never did; I have heard it from the ſervants.

Mr. Erſkine. Do you know where Mr. Sneyd went when he left Hanbury.

A. He went into his father's carriage.

Q. Did he go to Birmingham?

A. He went the Birmingham road.

Q. What ſtate of health was he in at the time he went away?

A. He ſeemed a little better.

Q. Was not his complaint at that time a fever and delirium?

A. I believe ſo.

Q. Was Mr. Cecil preſent when Mr. Sneyd went into his father's carriage at Hanbury-Hall, in the month of May?

A. Yes, Sir, my maſter was preſent.

Q. I aſk you upon your oath, Sir, whether you have any reaſon to believe, either directly or indirectly, that Mr. Sneyd, before he left Hanbury-Hall, planned the ſcheme of Mr. and Mrs. Cecil, and Mr. Edward Sneyd's coming to Birmingham on the 20th of June?

A. I have no reaſon to know or believe, this was a plan contrived by Mr. Sneyd for the purpoſe of getting this lady from her huſband.

LORD KENYON.--Have you any reaſon to think that this was a ſcheme formed by Mr. William Sneyd?

A. I have not, my Lord; I cannot ſwear more than I have ſaid.

Mr. Erſkine. You ſay, you recollect your maſter and miſtreſs, and Mr. Edward Sneyd going to Birmingham in a party in June laſt; now, upon your oath, Sir, were they not going on a viſit to Mr. Sneyd?

A. I cannot tell.

Q. Were they not going to Birmingham?

A. They were.

Q. How came Mr. Edward Sneyd to accompany them to Birmingham?

A. He had been ſome time in the houſe.

Q. Was not the adultery of this woman, Mrs. Cecil, notorious in the huſband's family at the time they ſet out for Birmingham?

Mr. Bower. I ſubmit to your Lordſhip that this is not evidence.

LORD KENYON.---I think this queſtion may be aſked: Whether it was not matter of notoriety that ſhe was falſe to her huſband's bed?

Mr. Erſkine. Was it not notorious in your maſter's family, at that time, that this adultery had been committed, and that it had been diſcovered to your maſter?

A. I have heard that it was diſcovered to my maſter.

Q. Then you have reaſon to believe, from the common report of the family, that the adultery of this lady was known to her huſband?

A. \

A. I believe it was.

Mr. Bower. I ſubmit to your Lordſhip, that this is nothing like evidence.

Mr. Erſkine. It is my duty to try if I can, conſiſtently with the rules of evidence, get at this fact, not only that it was notorious in the family, but alſo that this notoriety was accompanied with the diſcovery of it to the huſband.

LORD KENYON.---If you can, obtain an actual diſcovery of it.

Mr. Erſkine. Have you no reaſon to believe that Mr. Cecil did know of it before he went to Birmingham?

LORD KENYON.--Did you ever hear it ſpoken of in your maſter's preſence?

A. I did not.

Mr. Erſkine. Did you diſcover no alteration in your maſter's appearance before he went to Birmingham?

A. He appeared the ſame; he did not ſeem to be ill-affected with any thing.

Mr. Erſkine, to the Witneſs. Now I aſk you, Sir, if, ſince it was notorious to the family that your miſtreſs had been guilty of adultery, how happened it that you did not mention it to your maſter; particularly, ſince you diſcovered by his appearance that he did not know it? Was it like the fidelity of a ſervant, not to communicate ſuch an affair to his maſter?

A. I made no mention of it to my maſter.

Q. How many ſervants has Mr. Cecil?

A. Three or four and twenty.

Q. Now, Sir, I aſk you, whether theſe ſervants did not know and ſpeak of it as a fact, and whether it did not engroſs every part of their converſation?

A. They did not all ſpeak of it, becauſe they were not all in the houſe.

Q. Then you had no reaſon to know that the huſband, Mr. Cecil, ſet out for Birmingham, to indulge his wife with a ſight of this gentleman, to take her final leave of him?

A. I do not know that he did that; but I know they were going to Birmingham.

Q. Are any of the ſervants here that went that journey?

A. No, Sir.

Ann Vinican, examined by Mr. Bower.

Mrs. Vinican. I and my huſband are ſervants to Mr. Thompſon, who keeps the hotel in the Church-yard, Exeter.

Q. Do you remember any perſons coming to your houſe, who called themſelves *Mr. and Mrs. Benſon*, but whom you knew ſince to be *Mr. Sneyd and Mrs. Cecil?*

A. Perfectly well.

Q. Do you recollect in what cloaths Mr. Sneyd came?

A. He came in a pepper and ſalt-coloured coat; about the middle of June laſt year.

Q. Did you know Mrs. Cecil?

A. Yes, Sir, perfectly well; I know ſhe came to my maſter's houſe, and went by the name of Mrs. Benſon.

Q. How long did they remain at your maſter's houſe?

A. Three or four days.

Q. Now, during the time that they were at your maſter's houſe, did they ſleep in different bed-chambers, or in the ſame?

A. In the ſame, and in one bed:---I left them in the room together, with the candle burning; ---they deſired me to leave it, and ſaid they would put it out.

Q. Did you make the bed in the morning?

A. Sir, I did.

Q. Had it the appearance of two perſons having ſlept in it?

A. There was no other bed in the houſe made for Mr. Sneyd.

DEFENCE.

Mr. Erſkine. May it pleaſe your Lordſhip, and you, Gentlemen of the Jury.

I am the Counſel for this unfortunate defendant, who, not being himſelf in a ſituation capable to give me any inſtructions, I am obliged to riſe up, altogether uninſtructed, in his defence, having nothing but this little piece of paper that ſtates the pleadings in my hand.

I moſt heartily concur in the obſervations which have been made by my learned friend on the ſubject of adultery.

Either as it concerns religion, or morals, or wiſe policy, it is the buſineſs and duty of juries to check it; and I do aſſure you, my Lord, I do not mean any flattery; but I ſay, that there is no man who has a higher reſpect and veneration than I have for the manner in which your Lordſhip has always conſidered theſe cauſes when they have come into Court before you; and I think it unqueſtionably my duty here, while I am defending an unhappy man, not to ſtrike at the happineſs of ſociety, by advancing any thing which can leſſen the ſanction of nuptial obligation, in which the happineſs of mankind is ſo much involved. Indeed this cauſe is an awful monument, that Virtue is its own reward,

and

and that Vices and Errors bring their own puniſhment along with them. It is an awful monument, that the rules of Religion and Morality, and the various reſtraints they impoſe on our behaviour, inſtead of being impoſitions and reſtraints of harſh and powerful taſk-maſters, operate as acts of parental benevolence and affection, and that every thing which we are commanded to do, tends ultimately to our good.

This unhappy gentleman has felt it. He was a very young man, and fell into the ſnare of this woman, from whom the plaintiff will be relieved by your verdict.

This cauſe is only the fore-runner to that divorce which he will be entitled to receive by the proceedings of Parliament; for I do not mean to charge Mr. Cecil, either directly or indirectly, with having connived at this criminal intercourſe which took place between this unhappy gentleman and the plaintiff's wife, or to charge him with any immoral or indecent conduct whatever.

This injured huſband is entitled, by your verdict, to be releaſed from thoſe obligations which muſt be very diſtreſſing to him.

Gentlemen, you have no evidence here of that which is the great ſting in theſe caſes. You have no evidence before you of the ſeduction. It appeared in evidence, indeed, that this young Cupid conſtantly walked out in different parts with a woman who might be conſidered as a matron. She was poſſeſſed of no perſonal beauty or attractions; but who, from the rank and dignity which ſhe held in the country, as wife of Mr. Cecil, had an opportunity of drawing into her ſnare an unfortunate young man, who poſſeſſed an handſome perſon, which happened to attract her attention.

Gentlemen, when the defendant recollected the ſituation to which he was reduced, it pierced his mind. He fell into a delirium; and it is a fact abſolutely notorious, that no perſon in the family dreamed of any thing like a criminal intercourſe between theſe parties, until it was confeſſed by this unhappy young man, in the hour of ſickneſs, who was deſirous to make ſome ſort of atonement to the perſon whom he had injured, and to obtain his forgiveneſs. He was not the aggreſſor—but was drawn in by the allurements of this lady.

Gentleman, can you conceive, that for a month before, the adultery of this woman was notorious in a family where there were ſo many ſervants, and that the huſband ſhould be the only man who was ignorant of it? Although one ſervant might conceal it for fear, and another from want of fidelity to his maſter; yet it is contrary to all experience

to ſuppoſe, that in a family, conſiſting of ſo many domeſtics, no perſon ſhould be inſpired with ſo much honour, with ſo much allegiance and fidelity to the injured maſter as to inform him of his wife's baſeneſs. Why did none of them approach the huſband?---Becauſe they knew he was already acquainted with it.

I do not mean to tax Mr. Cecil with being that unconcerned man which he was deſcribed to be by one of his domeſtics. It is not true that he appeared always with the ſame face.

He was diſpoſed at one time to do an act which would have tied him to this woman for ever. She fell down on her knees, and implored her huſband to allow her once more to go and ſee this defendant, to take her final leave of him, and to give up his embraces for ever; and that ſhe would then return to her duty. Our firſt parent turned towards Eve, and the plaintiff, following his example, was willing to forgive his weaker half.

This lady ſet out to find this miſerable creature the defendant---a perſon lying in his bed---The moment ſhe found him, ſhe put a white coat upon him, clapped a falſe tail to his hair, and carried him off without delay, to Thompſon's Hotel at Exeter?

Gentlemen, my learned friend has conducted this cauſe very honourably :---I am ſure he will not contradict me in what I am about to ſay, becauſe he knows it as well as I do, and therefore will not oblige me to call witneſſes to prove it: we both know that the defendant is one of many children; that his father has very little property, and is unable to pay large damages. The defendant himſelf is a Curate, without any preferment whatever; and if you were to give a verdict for damages any thing like that which a man of fortune would be obliged to pay, he would be utterly undone and ruined; and now he is left an awful monument---deprived of his reaſon, loſt in his health, and miſerable in the extreme.

I hope, Gentlemen, you will remember one thing---that in this caſe there is no evidence of ſeduction. The defendant felt for the honour of his friend, as well as for his own ſituation.

Gentlemen, I ſhall trouble you with no more obſervations on this ſubject---This unfortunate defendant is entirely at your mercy---and I am ſure you will do that which is right between both parties.

LORD KENYON.

Gentlemen of the Jury,

I have too often had an opportunity of ſtating to Juries the opinion which I entertain of crimes of this ſort. The puniſhment of them is part of that public duty which the law has repoſed in you---I ſhall only, at preſent, ſtate to you who the parties are.

The plaintiff is a Gentleman of very large property, and the preſumptive heir of one of the largeſt fortunes in the kingdom. His wife alſo was a Lady of great fortune.

The ſituation of this young man, the defendant, has been intimated to you.

This is a ſubject entirely for your conſideration: you will not put him into a ſituation that will make him a priſoner for life.

The jury found a verdict for the plaintiff, Damages, ONE THOUSAND POUNDS.

KING'S BENCH Sittings after TRINITY TERM, 1790.

HOOKER BARTTELOT, *Eſq. againſt* SAMUEL HAWKER, *Eſq. for Criminal Converſation with the Plaintiff's Wife.*

This was an action of damages againſt the defendant, for having debauched and ſeduced the plaintiff's Wife. The damages were laid at 5,000.

Counſel for the plaintiff.

MR. ERSKINE *and* MR. SHEPHERD.

For the Defendant.

MR. BOWER *and* MR. BALDWIN.

Mr. Erſkine opened his addreſs to the Jury with an apology for appearing now for the *proſecution* in a cauſe of a ſimilar nature to that laſt tried (*Cecil againſt Sneyd*), in which he had undertaken the *defence*; and ſaid, I flatter myſelf

Gentlemen, that I may, without any inconſiſtency, call your ſerious attention to this caſe; for you might have obſerved, where my profeſſional duty called me to defend an unfortunate man in the former cauſe, I have neither attempted to inſult the Court, nor diſgrace myſelf, in the defence of my client, by ſpeaking lightly of the ſerious conſiderations of a Court of Juſtice; but every man who attends to the preſent caſe, muſt be ſenſible that a moſt grievous injury has been ſuſtained by the plaintiff.

Mr. Barttelot is a gentleman of family and fortune, who married in 1783, and lived with his wife in the greateſt affection until the time ſhe was debauched by Mr. Hawker, a gay military man, and an officer of dragoons.

Having ingratiated himſelf into this lady's affection, and uſed every art to debauch her, he at laſt unfortunately ſucceeded.

The defence that is to be ſet up this day, is one of a very artful deſcription, and I muſt therefore ſolicit you to treat it with the contempt it merits.

My learned friend the counſel for the defendant, will have an opportunity of producing articles of ſeparation; of diſagreements and differences that happened between Mr. and Mrs. Barttelot; and I ſhall not, perhaps, be able to prove any act of adultery antecedent to theſe articles of ſeparation: and then, moſt likely, I ſhall hear this defence from my learned friend :---"Why bring any complaint into a Court of Juſtice? Why has the huſband ſuffered?---This is not an action to puniſh the immorality of the offence, but to recover a recompence to the huſband for the loſs of the affection and company of his wife.---What has her huſband loſt from being deprived of the comfort and ſociety of a woman from whom, previous to any act of adultery, he had voluntarily ſeparated himſelf?"

And I have no doubt, in ſuch a caſe, if this defence is eſtabliſhed, but it will go ſtrongly to the mitigation of damages, although it would not be leſs heinous in the eye of God; yet, *quoad* the huſband, it will leſſen the damages. But if, on the contrary, I ſhall be able to prove the previous adultery to you, as I am inſtructed I ſhall, this defence will redound, with a ten-fold force, upon themſelves.

I need not tell thoſe who have come to that time of life at which you have arrived, that it is impoſſible for a man and a woman to live in peace, tranquility, and conjugal affection with each other, where the mind of the woman is alienated by a paſſion for another perſon. From the moment any third perſon has been able to infuſe an attachment

into the breaſt of a woman, there is an end of that affection and attention to her huſband, which alone can create reciprocity in affection; there is an end of every thing which conſtitutes the peace and happineſs of domeſtic life.

This caſe differs very much from the other which you have tried this morning: there the injured huſband may be ſeparated from his wife; he may marry again, and have a progeny to delight him, and to inherit the great eſtate to which he was born: in this caſe, the unhappy huſband, after ſeeing his wife debauched, muſt alſo have the mortification to ſee a baſtard iſſuing from her body very ſoon after the ſeparation took place, and all this proceeding from the ſeduction of the defendant; and, what is ſtill worſe, this baſtard may poſſibly ſucceed to the plaintiff's eſtate.

LORD KENYON.---Mr. Erſkine, will this action lie where there have been articles of ſeparation?

Mr. Erſkine.---Yes, my Lord, I think it will.

LORD KENYON.—I doubt that exceedingly. I never heard of ſuch an action: and I doubt on principles. It does not abate the immorality of the action; it ſtill leaves that.

Mr. Erſkine.——Gentlemen of the Jury, I felt this doubt; and, I confeſs, the damages muſt in a manner ſink from under me, if the acquaintance between the huſband and wife was at an end by the articles of ſeparation, previous to any act of adultery committed by the defendant. But, I hope, my Lord will reſerve that point to me, how far the action can be maintained, if the adultery is proved prior to theſe articles.

I ſhall be able to ſatisfy you, that from the period of the marriage, up to the time when Mrs. Barttelot became acquainted with this gentleman, the greateſt affection and domeſtic comfort ſubſiſted between her and her huſband. From the moment ſhe became acquainted with the defendant, or at leaſt ſoon after, thoſe differences aroſe; that coldneſs, that alienation of affection ſucceeded, which ended in their ſeparation. Immediately after this, Mrs. Barttelot fell into the hands of the defendant, who has lived with her, and has a child by her. Your judgment, Gentlemen, in ſuch a caſe, will direct you to exemplary damages.

LORD KENYON.——Mr. Baldwin, did you ever know an action like this?

Mr. Baldwin.——No, my Lord, I never knew ſuch an action brought.

LORD KENYON.——I have a ſtrong opinion it will not lie.

Mr.

Mr. Erſkine.——Your Lordſhip ſees it would be very hard on this gentleman, as it would deprive him of a divorce.

LORD KENYON.—Many perſons may be in a ſituation that may deprive them of divorces. What Parliament might do in this caſe, God only knows; they generally require a verdict at law; but if he *could not* have an action, I think they would ſtop ſhort of juſtice, if they did not diſpenſe with it.

EVIDENCE FOR THE PLAINTIFF.

The marriage of Mr. and Mrs. Barttelot, on the 18th of January, 1783, was proved by John Horton, Mrs. Barttelot's brother.

Croſs-examined by Mr. Bower.

Q. Do you know how they lived together; I believe they did not live in great affection?

A. They were always quarrelling, ſome time after their marriage. Within a month they often quarrelled together; and within two months after their marriage, the family was obliged to be called in to compoſe their differences; their tempers were ſo different, and ſo ill-ſuited to each other.

Q. They were, therefore, a very unhappy couple?

A. Quite ſo.

Mary Rothe ſworn.

Q. Mrs. Rothe, do you know Mr. and Mrs. Barttelot?

A. Yes, Sir; they came to live at my houſe in July, 1785, at Aſhford, in Kent, and ſtayed five weeks.

Q. How did they behave to each other?

A. At firſt when they came, they behaved extremely well.

Q. Did you know Captain Hawker?

A. I did. I have ſeen Captain Hawker and Mrs. Barttelot together?

Q. Did you ever obſerve any thing particular between them?

A. I have ſeen them behave in a manner which I looked upon to be very indecent. I ſaw Mr. Hawker put his hand on Mrs. Barttelot's leg, in a very indecent way.

Q. Were her cloaths up?

A. Yes, Sir, they were higher than the calf of the leg; and Mr. Hawker put his hand very indecently.

Q. Did you communicate this to Mr. Barttelot?

A. No, Sir, not then.

Q. Did you make any other obſervations on their conduct?

A. I

A. I thought this was very unbecoming in any woman, particularly in a married woman.

Q. Did Mr. Barttelot behave in an affectionate manner to his wife?

A. Always, Sir.

John Barbic ſworn.

Q. Mr. Barbic, I believe you live near Canterbury. Do you remember Mr. and Mrs. Barttelot coming to live at your houſe in the year 1785?

A. I do, Sir, it was ſome time in the month of Auguſt.

Q. Do you remember Captain Hawker viſiting them?

A. Very well.

Q. After they had been there ſome time, did you make any obſervations on the conduct of Mrs. Barttelot and Mr. Hawker?

A. I entertained ſome ſuſpicion of an intimacy between them.

Q. During the time that Mr. and Mrs. Barttelot lodged at your houſe, do you remember his going to London for a few days about ſome buſineſs?

A. I do.

Q. During the time that Mr. Barttelot was in London, do you recollect any circumſtance relating to Capt. Hawker and Mrs. Barttelot?

A. I heard a man's voice in Mrs. Barttelot's bed-chamber about one o'clock in the morning.

Q. Now, how did Mr. Barttelot behave to his wife?

A. He ſeemed to me to behave to her with a great deal of tenderneſs.

Q. Do you remember Mrs. Barttelot going away?

A. I remember very well ſhe went away with the maid-ſervant, during the abſence of Mr. Barttelot.

Q. Do you remember Mr. Barttelot's returning?

A. I do. About one or two days after.

Mrs. Barbic ſworn.

Q. Do you remember Mr. and Mrs. Barttelot lodging at your houſe?

A. Yes, Sir, I do.

Q. How did this gentleman behave to his wife?

A. So far as I ſaw, he always treated her with tenderneſs and affection.

Q. Do you remember the time of their having been viſited by Captain Hawker?

A. I do.

Q. Did you obſerve any thing particular in his behaviour towards this lady?

A. I did.

Q. What did you obſerve in particular?

A. I obſerved a familiarity between them.

Q. Do you remember Mr. Barttelot's going to London for two or three days, and leaving Mrs. Barttelot at home?

A. Yes, I do.

Q. Do you remember any perſon being in her bed-chamber in the night?

A. I do.

Q. Who was that perſon?

A. Captain Hawker.

Q. Have you any doubt about it?

A. I have no doubt of it; I ſaw him go up ſtairs about twelve o'clock at night; he loitered about the door for a great while, until eleven or twelve o'clock at night, and then went up ſtairs.

Q. Will you ſwear poſitively that he was in Mrs. Barttelot's bed-chamber?

A. I will, and that he remained there until the next day, when I ſaw him come down again.

Mr. Barbic called again.

Q. Is that the perſon whoſe voice you heard in the room with Mrs. Barttelot?

A. Yes, Sir, it was.

Q. to Mrs. Barbic, How long did he remain in Mrs. Barttelot's bed-chamber?

A. He remained there all night, and the next day until three o'clock in the afternoon:---the ſervants were then diſpoſed all in different ways, and this gentleman came down.

Q. He had been in the bed-chamber with the lady then?

A. I heard him in the bed-chamber, and he was there all night. I told Mrs. Barttelot of it next day.

The Rev. Mr. Bond ſworn.

Q. Do you know Mr. and Mrs. Barttelot?

A. I do; I had an opportunity of ſeeing them very frequently.

Q. Upon thoſe occaſions, how did Mr. Barttelot behave to his wife?

A. With the greateſt tenderneſs. They ſeemed to live very happily together.

DE-

DEFENCE.

Mr. *Bower*.—May it pleaſe your Lordſhips, and you, Gentlemen of the Jury! I muſt agree with my learned friend, Mr. Erſkine, that the queſtion which you have to try, is not, Whether the defendant has been guilty of an immorality? but, Whether this breach of morality has been attended with any injury to the plaintiff?

To ſay, whether adultery ought to be encouraged or diſcouraged, is a queſtion which will admit of no doubt; and, about which, I truſt, every man in this Court is fully agreed: but in no caſe that comes before a Court is it more neceſſary to attend to the ſituation of the parties, than in thoſe caſes where there is a charge of ſeduction. In the preſent caſe, the plaintiff has no ground of complaint; becauſe, from the commencement of their marriage, they were miſerable. They were compoſed of materials ſo utterly diſcordant, that from the very hour the connexion took place, they found themſelves in miſery and in ruin.

The lady's own brother proved, that within two months of their marriage, they were a moſt miſerable and wretched couple; and it is in vain to remove this impreſſion, by calling three witneſſes, who ſaw them only at particular times, and had no opportunity of obſerving their hiſtory.

I ſhould not be the man to excuſe the defendant, if he had been the original ſeducer: if he had corrupted this lady's mind; had alienated her affections from her huſband, and had been the miſchievous inſtrument of diſturbing his domeſtic peace and tranquillity. But I ſhall prove to you, by the Lady's father, that in the ſpace of one month after this marriage, there was ſuch ill treatment, and ſuch quarrels between the parties, that he, on a viſit from his ſon-in-law and daughter, ſpent almoſt a whole night in reconciling the quarrels, which within that ſhort ſpace had ariſen between them. He will prove to you, that the family was a ſcene of perfect wretchedneſs.

Gentlemen, you will obſerve that it has not been attempted to be proved to you, that Mr. Bartelot ever knew of the improper intercourſe that ſubſiſted between his wife and Mr. Hawker at Aſhford, in 1785, and therefore it was not in conſequence of this that the ſeparation took place, but in conſequence of that perpetual ſtate of miſery which had ſubſiſted between them, previous to that acquaintance with Mr. Hawker, and from the time of the marriage.

And

And to get rid of that load of misery, at a time when he was not conscious of any infidelity in his wife, he consented, in 1786, to articles of separation, and to leave her at liberty to act as she pleased.

In these articles it was mutually agreed between the parties, that she, Sophia, should from thenceforth live separate and apart from him, the plaintiff, at such place or places, and with such person or persons as she pleased; and that she be free from and without, molestation or hindrance by him, or any other person in or through him, in any manner, or on any account or pretence whatever; and that he the said Mr. Barttelot, his heirs and executors, should not molest or trouble, institute or prosecute, or cause to be instituted or prosecuted, any suit or suits, action or actions, in any Court or Courts whatsoever, against the said Sophia, "or against "those with whom the said Sophia should live and cohabit; "and if any such action or actions, suit or suits, should be "commenced or instituted, then, in every such case and "cases, this shall be pleaded specially in bar, and shall be "considered as full recompence and satisfaction for every "such action or actions."

This man, therefore, without any suspicion of his wife's infidelity, voluntarily entered into articles of separation, which were extremely desirable on both sides.

The defendant, instead of being a man of fortune, as was stated by my learned friend, is only one of ten children, the son of a clergyman, and has only a lieutenancy in the army to support him.

How can you say, Gentlemen, that the husband's peace has been destroyed by this man?

From the situation of the parties, you must see that no injury has been done; which is the question you are to try, and not whether the defendant has been guilty of an immoral action.

Under these circumstances, I submit that nominal damages will answer the justice of this case.

Doctor Horton sworn.

Q. Doctor, had you an opportunity of seeing the terms on which these parties lived?

A. Soon after they were married, they lived on very indifferent terms.

Q. Did it appear to you, Sir, to be a marriage of inclination?

A. I do not think there was much inclination in it.

Q. Did

Q. Did they continue to live unhappy from the time of their marriage to their ſeparation?

A. Very much ſo, indeed.

Q. Do you remember any particular behaviour from Mr. Bartelot towards his wife?

A. I do, Sir. About five weeks after the marriage, they had been quarrelling about going into a hackney-coach, and at night I had great difficulty to reconcile them; I was an hour and more in attempting it.

Croſs-examined by Mr. Erſkine.

Q. You are the father of this lady. Did you ſtate to Mr. Bartelot your daughter's diſinclination to him?

A. No, Sir, I did not.

Q. I would wiſh, Sir, to know the conduct of this gentleman towards your daughter, immediately after the marriage; what was it?

A. They lived very unhappily together.

Q. Did ſhe bring him a fortune?

A. No, ſhe did not; I ſuppoſe he married her for affection.

Q. From what you know of your daughter, have you any reaſon to ſuppoſe that ſhe would fall into this ſort of conduct, without the ſeduction of ſomebody?

A. No, Sir; I certainly have not.

Q. Had you any reaſon to believe ſhe was ever guilty with any other perſon than Mr. Hawker?

A. I had no reaſon, nor any thing like it, to believe ſhe was ever criminal with any other perſon.

Q. I ſhould be glad to know what was the nature of thoſe diſputes that took place between this gentleman and his lady?

A. There were many quarrels between them; but the firſt that I recollect, was one night about getting into a hackney-coach; there were four of us there. He ſaid he would rather walk home.

Q. Now, then, what did the lady ſay?

A. She entreated him to come into the coach, and ſo did thoſe who were with her, and he then came, and ſhe reproached him for being ſo rude and ungentleman-like, and for doing all this before ſome of her beſt friends.---Here the diſpute ended.

Q. To be ſure this was very rude and obſtinate, not to come into the hackney-coach; but was there any thing to occaſion a ſeparation from bed and board?

A. N

A. No; but there was a continuance of theſe quarrels.

Q. This, then, was the firſt remarkable inſtance that occurred?

A. This was one of the moſt prominent diſputes that made their appearance in the family. They were married in January, and this happened in February.

Mr. Bower.---I think, Sir, you ſaid they lived very unhappily from the time of their marriage, to the time of their ſeparation?

A. Exceedingly ſo, indeed.

Q. Had they any children?

A. No children.

Mr. Erſkine.---Do you not know, Sir, that your daughter had a child?

A. I know, from being told, that ſhe had a child by Mr. Hawker; but I never ſaw it.

Q. I wiſh you would give us an inſtance of thoſe harmonious jangles that took place between your daughter and ſon-in-law?

LORD KENYON.---I am afraid theſe quarrels proceed very often from very ſmall things, and put the parties in a very ridiculous ſituation.

Witneſs.---In the middle of the night I heard a ſtamping and ſwearing. I then got up, and reproached my ſon-in-law very much, for his indecent behaviour in my houſe; my daughter ſaid ſhe was afraid of him. After a good deal of altercation, I, with difficulty, got them to bed again.

Andrew Scott ſworn.

Q. Do you know the defendant, Mr. Hawker, Sir.

A. I do; he is a Lieutenant in a Regiment of Dragoons, and his father is a Clergyman.

Q. Has he any thing to ſupport him but his pay?

A. Nothing.

MR. ERSKINE.

May it pleaſe your Lordſhip, and you, Gentlemen of the Jury,

I can by no means ſubſcribe to a great deal which I have heard from the learned Counſel for the defendant.

I do admit, that as Divines or Moraliſts, or as Adminiſtrators of Criminal Juſtice, you are not to decide as againſt men acting againſt the Law of God and of Morality: but I ſay, where the conduct of the defendant, even in a civil ſuit, is connected with the intereſts of ſociety, and the preſervation of the peace of mankind, that it be-

becomes a matter of conſequence infinitely ſerious; and he who has invaded the rights of individuals, being more pernicious than others, by having ſet a bad example to ſociety, ſo he deſerves a more ſevere puniſhment.

It has been ſaid, that my client does not come into a Court of Juſtice, under circumſtances to claim the compaſſion of a Jury; and that the defendant being one of ten children, and the ſon of a Clergyman without property, ought therefore to go free.

God forbid, Gentlemen, that a man who has nothing but his commiſſion in the army, might commit heinous crimes, and then be permitted to plead his poverty; he might then break into your houſe——he might violate your wife, and might deflower your daughter:——he might do every act to which the law attaches a puniſhment, if he had only to plead his poverty, and then to be ſet free from all the conſequences of his villainy.

My learned friend ſays, that the huſband has loſt nothing—Has he not? If this woman brings forth children, they muſt inherit his fortune.

But, Gentlemen, my friend is anxious to convince you that the plaintiff has ſuſtained no loſs, becauſe there were ſome bickerings between him and his wife: becauſe people are not angels, does it follow from thence that there is no comfort belonging to that ſituation?

Becauſe a man may have ſome paltry diſputes with a woman with whom he lives, does it from thence follow, that they have no affection and regard for each other? May not he bring back her wandering imaginations by conſtant attention to her, although ſhe does not love her huſband, who ought to be the object of her affections? May they not acquire a mutual attachment, by the children that might be produced?—You have heard ſhe had a child by this man.—She might have borne children that might have been pledges of their affection—that might have been a bond of union, and all theſe quarrels ended.

The defendant, taking advantage of the huſband's abſence, took that opportunity of debauching the plaintiff's wife.

Gentlemen, I cannot ſuppoſe that men of your decent manners——I cannot ſuppoſe that men of your moral behaviour——I cannot ſuppoſe that men of your religious education, can countenance a conduct of this ſort, either as public or private men.

I [illegible]

I have another obſervation to make to you; and it is this: though you muſt be ſatisfied there was an act of adultery, yet no man commits crimes in the face of the public, as he enters into contracts.

You muſt collect the evidence circumſtantially. People do not commit adultery, and invite others to be witneſſes to the ſcene. But mark the evidence; the defendant lounges about the door—waits for the opportunity—conceals his perſon from obſervation——and at laſt gets into the bed-chamber of a married lady, and remains there all night. Now, are you to preſume—my learned friend, with a great deal of good ſenſe, has made no ſuch obſervation—are you to preſume *they ſat up all night*—that a man who came here for the purpoſe of adultery, which is evident from what followed, went into her bed-chamber for this purpoſe of ſitting up all night? Common ſenſe rejects the idea.

I have only one obſervation more to make. The father had not an opportunity of telling you how long Captain Hawker was introduced to his daughter. You find them acquainted in the year 1785. How can you tell but that theſe quarrels were firſt occaſioned by his ſeduction; and that all theſe differences might have been put an end to by children?

There is nothing more ſerious than the preſervation of morality; it is eſſential to the very being of a nation; for when there is a want of morals, there is an end of every thing that is great and honourable among men, and damages is here the only puniſhment.

I truſt, Gentlemen, becauſe ſome diſputes ſubſiſted between Mr. and Mrs. Barttelot, you will not think that the huſband has loſt nothing; but will give him a verdict in damages ſuited to the circumſtances of his caſe.

LORD KENYON.

Gentlemen of the Jury,

You have tried two cauſes of this ſort this morning.

The moſt likely way to preſerve men in the road of their duty is, by implanting in their breaſt ſentiments of religion and virtue. When this fails, the next reſource is puniſhment; and in cauſes of this kind, it depends upon Juries not to let men go from this Court, without ſmarting for the injuries they have done to their neighbours, and for the wretched ſtate to which they reduce the private peace of families.

That the relation of huſband and wife ſubſiſted between Mr. and Mrs. Barttelot has been proved.

There

There are two queſtions in this caſe for your conſideration.

Firſt---Whether the defendant has been guilty of the charge which has been imputed to him? And,

Secondly---If you find him guilty, what damages are to be given.

Now, it has been very properly ſaid, that in offences of this kind, and in general, perſons who are guilty do not ſummon witneſſes to ſee their guilt. You muſt prove it as well as you can from circumſtances; and if they are cogent and convincing, you muſt give them the ſame force as if you had been eye or ear witneſſes.

In order to prove this party guilty, the firſt witneſs ſtated inſtances of extreme indelicacy between theſe perſons. The other witneſſes have carried the caſe further; for Mr. and Mrs. Barbic proved that they heard, at an improper hour of the night, the voice of a man in Mrs. Barttelot's bed-chamber. Mrs. Barbic ſays,--That the defendant went up ſtairs about *eleven or twelve o'clock at night*; he paſſed her briſkly, and ſhe did not diſtinguiſh him; but in the morning ſhe ſaw him come down. But it is ſaid, ſhe was not in the room--nor was it neceſſary; he could have no buſineſs there, but the purpoſe which this cauſe imputes to him.

Gentlemen, it is for you to deliberate on that; and if you are led to believe, that this act was done at that time, as, I confeſs, it ſeems ſo to me, the concluſion follows of courſe.

The next point is ——The *damages* you will give. And, certainly, it is no apology to ſay, "I am poor:" and it would be reading a very bad leſſon to tell young officers, or any other perſons, "On account of your poverty you may commit offences up to any extent; you may invade the deareſt rights of mankind, and your poverty ſhall be ſpread before you as a ſhield."

There are ſome circumſtances to extenuate, and others to aggravate this offence. It is an aggravation to defile the bed of a married man, as he is deprived of the comfort and converſation of his wife. To be ſure, it is often preſſed, and not improperly, that the offence is not ſo aggravated, where there were no children. Although this be ſo, yet it is equally a breach of religion and morality.

An act of adultery has been proved in the year 1785. In the *following* year, articles of ſeparation took place.

Gentlemen, it is entirely with you to ſay--Firſt, Whether he is guilty?—And then, if he is—What damages are to be given to the injured party?

The

The Foreman of the Jury aſked, Whether Mrs. Barttelot's child, by Mr. Hawker, muſt inherit the eſtate of Mr. Barttelot.

LORD KENYON ſaid, This muſt depend on circumſtances.

The Jury then gave their verdict for the plaintiff, with Seven Hundred Pounds damages.

STATUTES paſſed in the laſt Seſſions of Parliament.

An Act to impower Juſtices, and other Perſons, to viſit Pariſh Workhouſes or Poorhouſes, and examine and certify the State and Condition of the Poor therein to the Quarter Seſſions.

Whereas the laws now in being for the regulating pariſh workhouſes, have been found deficient, when the poor in ſuch houſes are afflicted with contagious diſeaſes, in which caſes particular attention to their lodging, diet, cloathing, bedding, and medicines, is requiſite; be it enacted, That after the 29th day of September, 1790, it ſhall and may be lawful for any of his Majeſty's Juſtices of the Peace, or any Phyſician, Surgeon, or Apothecary, for that purpoſe authorized by warrant under the hand and ſeal of any ſuch Juſtice or Juſtices, or for the officiating Clergyman of the pariſh or place, duly authorized, as aforeſaid, at all times, in the day time, to viſit any pariſh workhouſe, or houſe provided for the maintenance of the poor of any pariſh or place, within the county, riding, liberty, or diviſion, wherein ſuch Juſtice or Juſtices ſhall be reſident and have juriſdiction, to examine into the ſtate and condition of the poor people therein, and the food, cloathing, and bedding of ſuch poor people, and the ſtate and condition of ſuch houſe or houſes; and if upon any ſuch viſitation the ſaid Juſtice or Juſtices, or perſons authorized aforeſaid, ſhall find any occaſion of complaint, ſuch Juſtice or Juſtices, or perſons authorized as aforeſaid, ſhall, if he or they ſhall think fit, certify the ſtate and condition of ſuch workhouſe or poorhouſe, and the ſtate of the poor therein, and of their food, cloathing, and bedding, to the next Quarter Seſſions of the Peace to be held

held for ſuch county, riding, liberty, or diviſion, wherein ſuch workhouſe or poor houſe ſhall be ſituate, under his or their hands and ſeals reſpectively; and ſuch Juſtice or Juſtices, or perſons aforeſaid, ſhall cauſe the Overſeers of the Poor, or Maſter or Governor of the ſaid workhouſe or poorhouſe to be ſummoned to appear at the ſame Seſſions, to anſwer ſuch complaint; and the Juſtices aſſembled at ſuch Quarter Seſſions, on hearing the parties on any ſuch complaint, ſhall and may make ſuch orders and regulations for the removing of any cauſe of complaint contained in ſuch certificate as aforeſaid, as to them ſhall ſeem meet; and all the parties concerned ſhall, and they are hereby required to abide by and perform ſuch orders and regulations as ſhall be ſo made by the Juſtices at the ſaid Seſſions.

Provided always, and be it further enacted, That in caſe any Juſtice or Juſtices of the Peace, or perſons duly authorized by warrant as aforeſaid, ſhall, upon any ſuch viſitation, find any of the poor afflicted with any contagious or infectious diſeaſe, or in want of immediate medical or other aſſiſtance, or of ſufficient and proper food, or requiring ſeparation or removal from the other poor in the ſaid houſe, then and in ſuch caſe or caſes, if ſuch viſitation ſhall be made by a Juſtice of the Peace, he is hereby directed and required to apply to one or more other Juſtice or Juſtices of the Peace, in the county, riding, liberty, or diviſion, and certify to him or them the ſtate and condition of the poor in ſuch pariſh workhouſe or poorhouſe; or if ſuch viſitation ſhall be made by the perſons duly authorized as aforeſaid, they are hereby required to apply to two or more Juſtices of the Peace in ſuch county, riding, liberty, or diviſion; and thereupon the ſaid Juſtices ſhall and may, and they are hereby authorized to make ſuch order for the immediate procuring medical or other aſſiſtance, or of ſufficient and proper food, or for the ſeparation or removal of ſuch poor as ſhall be afflicted with any contagious or infectious diſeaſe, in ſuch manner as they the ſaid Juſtices, under their hands and ſeals, ſhall think proper to direct, until the next Quarter Seſſions of the Peace, to be held in and for the ſaid county, riding, liberty, or diviſion, wherein ſuch houſe ſhall be ſituate; at which Quarter Seſſions of the Peace the ſaid two Juſtices are to certify the ſame, under their hands and ſeals reſpectively, to the Juſtices aſſembled at ſuch Quarter Seſſions, who are hereby authorized and required to make ſuch order for the further relief of the poor in ſuch pariſh workhouſe or poorhouſe, as to the Juſtices aſſembled at ſuch Quarter Seſſions ſhall ſeem meet and proper;

per; and the charges and expences of relieving ſuch poor ſhall be, and is hereby directed to be paid out of the poor's rate of ſuch pariſh in ſuch manner as the ſaid Juſtices aſſembled at ſuch Quarter Seſſions ſhall direct.

Provided always, that nothing herein contained ſhall extend to any poorhouſe or workhouſe in any diſtrict or diſtricts which have been, or may be hereafter incorporated or regulated by any ſpecial Act or Acts of Parliament.

An Act to explain and amend an Act, paſſed in the Twentieth Year of the Reign of His preſent Majeſty, touching the Election for Knights of the Shire to ſerve in parliament for that Part of Great Britain called England.

Whereas an Act was paſſed in the twentieth year of the reign of His preſent Majeſty, (cap. 17), intituled "An Act to remove Difficulties relative to County Elections," it is enacted, that no perſon ſhall vote for Knights of the Shire in reſpect of any meſſuages, lands, or tenements, which have not, for ſix months next before ſuch election, been charged towards the Land Tax, in the name of the perſon or perſons who ſhall claim to vote at ſuch election for or in reſpect of the ſame, or in the name of his or their tenant actually occupying the ſame as a tenant of the owner or landlord thereof: and whereas the form of aſſeſſment preſcribed by the ſaid Act, and thereunto annexed, denotes that the names, both of the proprietor and of the occupier, ought to be ſpecified; and doubts have ariſen, whether, if ſuch form be not ſtrictly purſued, the ſuffrage of the perſon claiming to vote be admiſſible. Be it therefore enacted, That nothing in the ſaid Act contained ſhall prevent any perſon from voting at any election of Knights of a Shire, or at any election of a burgeſs for the Borough of Cricklade, for or in reſpect of any meſſuages, lands, or tenements, which have been charged or aſſeſſed, for ſix calendar months next before ſuch election, towards ſome aid granted or to be granted to his Majeſty, his heirs or ſucceſſors, by a land-tax, in the name of the perſon claiming to vote, or for or in reſpect of any meſſuages, lands, or tenements, to which the perſon ſo claiming to vote ſhall have become entitled by deſcent, marriage, marriage-ſettlement, deviſe, promotion to any

benefice in a church, or promotion to any office, within twelve calendar months next before ſuch election, and which meſſuages, lands, or tenements, ſhall have been within two years next before ſuch election charged or aſſeſſed to the land-tax, in the name of the perſon or perſons by or through whom ſuch perſon ſo claiming to vote, ſhall derive his title to ſuch meſſuages, lands, or tenements, or of ſome predeceſſor of ſuch perſon ſo claiming to vote, although the name of the tenant or tenants actually occupying ſuch meſſuages, lands, or tenements, ſhall not be inſerted in ſuch aſſeſſment, according to the form of aſſeſſment to the ſaid firſt recited Act annexed.

And be it further enacted, that nothing in the ſaid Acts ſhall prevent any perſon from voting at any ſuch election of Knights of any Shire, or of Burgeſſes for the ſaid Borough of Cricklade, for or in reſpect of any meſſuages, lands, or tenements, which have been charged or aſſeſſed, for ſix calendar months next before ſuch election, towards ſome aid granted, or to be granted to his Majeſty, his heirs or ſucceſſors, by a land-tax, in the name of a tenant or tenants actually occupying the ſame at the time of ſuch aſſeſſment being made, although the name of the perſon ſo claiming to vote, or the perſon or perſons by or through whom ſuch perſon ſo claiming to vote derives his title, or of the predeceſſor of the perſon claiming to vote, ſhall not be inſerted in the aſſeſſment, according to the form of the aſſeſſment to the ſaid firſt recited Act annexed.

An Act for diſcontinuing the judgment which has been required by Law to be given againſt Women convicted of certain Crimes, and ſubſtituting another Judgment in lieu thereof.

Whereas it is expedient that the judgment which has been required by law to be given and awarded againſt any woman or women in the caſes of high-treaſon, or of petit-treaſon, ſhould be no longer continued: be it enacted, that after the 5th day of June, 1790, the judgment to be given and awarded againſt any woman or women convicted of high treaſon, or of petit-treaſon, ſhall not be, that ſuch woman or women ſhall be ſeverally drawn to the place

execution, and be there burned to death; but that ſuch woman or women being ſo convicted as aforeſaid, ſhall be ſeverally drawn to the place of execution, and be there hanged by the neck until ſhe or they be ſeverally dead; any law or uſage to the contrary thereof in anywiſe notwithſtanding.

And be it further enacted, that if any woman or women ſhall be convicted of the crime of petit-treaſon, ſuch woman or women ſhall be ſubject and liable to ſuch further pains and penalties as are particularly ſpecified and declared with reſpect to perſons convicted of wilful murder, in an Act paſſed in the 25th year of King George II. (intituled, "An Act for preventing the Crime of Murder"); and the Court before whom any ſuch woman or women ſhall be convicted, ſhall paſs ſentence at ſuch time, and ſhall give ſuch orders with reſpect to the time of execution; the diſpoſal of the convict's body after execution, and all ſuch other matters and things as are directed to be given by the ſaid Act, with reſpect to perſons convicted of wilful murder.

And be it further enacted, That whenever any woman ſhall be convicted of the crime of high-treaſon, or of the crime of petit-treaſon, or of abetting, procuring, or counſelling any petit-treaſon, and judgment ſhall be given thereon, according to the directions of this act, then, and in every ſuch caſe, ſuch woman, being ſo attainted of ſuch crimes reſpectively, ſhall be ſubject and liable to ſuch and the like forfeitures, and corruption of blood, as they ſeverally would have been in caſe they had been ſeverally attainted of the like crimes before the paſſing of this Act.

An Act for repealing the Duties upon Licences for retailing Wine and Sweets, and upon Licences for retailing diſtilled Spirituous Liquors, and for granting other Duties in Lieu thereof.

Whereas by an Act, made in the 9th year of *Q. Anne*, cap. 23, it was enacted that there ſhould be, for every piece of vellum, parchment, or paper, on which ſhould be written any licence for retailing of wine, the ſum of four ſhillings: and whereas, by another act made, 30 *Geo.* II. cap. 19, it was enacted, that there ſhould be paid, for every licence for retailing of wine, to be granted to any perſon who ſhould not take out ei-

ther a licence for retailing of ſpirituous liquors, or a licence for retailing of beer, over and above all other rates and duties, an additional ſtamp duty of five pounds; for every licence for retailing of wine, to be granted to any perſon who ſhould take out a licence for retailing beer, but ſhould not take out a licence for retailing of ſpirituous liquors, over and above all other rates and duties, an additional ſtamp duty of four pounds; and for every licence for retailing of wine, to be granted to any perſon who ſhould alſo take out a licence for retailing of ſpirituous liquors, over and above all other rates and duties, an additional ſtamp duty of forty ſhillings; and it was by the ſaid Act provided, that, in all caſes where a duty of five pounds was therein before directed to be paid on a licence for retailing wine, a duty of three pounds ſix ſhillings and eight-pence, and no more, ſhould be paid for a licence to retail wine in Scotland; and that in all caſes where a duty of four pounds was therein before directed to be paid for ſuch licence, a duty of two pounds thirteen ſhillings and four-pence, and no more, ſhould be paid for a licence to retail wine in Scotland; and that in all caſes where a duty of two pounds was therein before directed to be paid for every ſuch licence, a duty of one pound ſix ſhillings and eight-pence, and no more, ſhould be paid for a licence to retail wine in Scotland: and it was by the ſaid Act enacted, that no perſon whatſoever, unleſs he ſhould be authorized in the manner therein preſcribed, ſhould ſell by retail, (that is) by the pint, quart, pottle, or gallon, or by any other greater or leſs retail meaſure, or in bottles in any leſs quantity than ſhould be equal to the meaſure of the caſk or veſſel in which the ſame ſhould have been, or might lawfully be imported, any kind of wine or wines, or any liquor called or reputed wine, upon pain to forfeit for every ſuch offence the ſum of one hundred pounds: and whereas, by a clauſe in another Act made 31 *Geo.* II. cap. 31, it was enacted, that no perſon whatſoever, unleſs he ſhould be authorized by having taken out the licence to ſell wine by retail, ſhould ſell or utter by any retail meaſure, or in bottles in any quantity leſs than twenty-five gallons, any kind of liquor made in Great Britain by infuſion, fermentation, or otherwiſe, from foreign fruit or ſugar, or from Britiſh fruit or ſugar, or from fruit or ſugar mixed with any other ingredients, commonly called ſweets or made wines, or any kind of liquor made in Great Britain, and known by the name of ſweets or made wines of whatſoever materials, or in whatſoever manner the ſame might be made, upon pain to forfeit for every ſuch offence one

one hundred pounds: and whereas by another Act, made in the 26th *Geo.* III. cap. 74, "for granting to his Majeſty additional Duties upon Sweets," reciting, that it was then expedient that ſeparate licences ſhould be granted to the venders of foreign wines imported, and to the venders of ſweets or Britiſh made wines, it was enacted, that it ſhould be lawful for his Majeſty's Commiſſioners of Stamps, to grant any licence for ſelling of ſweets or Britiſh made wines by any retail meaſure, to any perſon applying for the ſame (although ſuch perſon or perſons ſhould not have a ſpirituous liquor or ale-licence), with a ſtamp of two pounds and four ſhillings; and all perſons ſelling Britiſh-made wines only under ſuch licences, ſhould be freed and diſcharged from any penalty for ſelling wine under licences not ſtamped as by the ſaid Acts were directed: and whereas by another Act, made in the 28th *Geo.* III. cap. 37, "to prevent the Sale of Sweets for Conſumption in the Houſes of Retailers thereof, who ſhall not have Licences to ſell Beer or Ale," reciting ſo much of the ſaid Act made in the 26th year of his preſent Majeſty as is hereinbefore recited; and that it was expedient to reſtrain the ſelling Britiſh wines for conſumption in the houſes of retailers thereof to ſuch perſons only as ſhould have obtained as well a licence for ſelling beer and ale, as a licence for the ſale of Britiſh-made wines, it was enacted, that no perſon ſhould, by virtue of any licence for the ſale of Britiſh-made wines or ſweets, be intituled to ſell ſuch wines or ſweets, for conſumption in his or her own houſe, unleſs ſuch perſon ſhould alſo have obtained a licence for ſelling beer and ale: and whereas it is apprehended, that if the ſaid recited duties were repealed, and other duties impoſed in lieu thereof upon licences to be granted, by the Commiſſioners, Collectors, and Superviſors of EXCISE, in England and Scotland reſpectively, to perſons retailing foreign wine, or Britiſh-made wines or ſweets; ſuch laſt-mentioned duties would be more conveniently and effectually managed and collected: BE IT THEREFORE ENACTED, that after the 10th day of October, 1790, the ſaid recited duties, under the management of the ſaid Commiſſioners of STAMPS, by the ſaid Acts impoſed upon any ſuch licence as aforeſaid, ſhall ceaſe and determine.

And whereas, by another Act made in the 26th *Geo.* II. cap. 8, it was enacted, that no perſon ſhould preſume to retail any diſtilled ſpirituous liquors, or ſtrong waters, without firſt taking out a licence for that purpoſe for which he ſhould pay the ſum of twenty ſhillings: and whereas, by another Act made in the 24th *Geo.* II. cap. 40, it was enacted,

enacted, that there ſhould be paid unto his Majeſty, an additional duty of twenty ſhillings per annum for every licence that ſhould be taken out by any perſon or perſons for the retailing ſpirituous liquors: and whereas, by three ſeveral other Acts of Parliament, made in the 19th *Geo.* III. cap. 25; 21 *Geo.* III. cap. 17; 22 *Geo.* III. cap. 66; three ſeveral additional duties of five pounds *per Centum* became charged upon the produce of the ſaid ſeveral duties: and whereas, by another Act made in the 27th *Geo.* III. cap. 30, it was enacted, that there ſhould be paid the ſeveral ſums upon all licences, by all perſons who ſhould retail any diſtilled ſpirituous liquors; and whereas it is expedient to repeal the ſaid recited duties by the ſaid ſeveral Acts, and, in lieu thereof, to impoſe other duties on licences to be taken out by perſons who ſhall retail diſtilled ſpirituous liquors, according to the directions of this act; be it therefore further enacted by the authority aforeſaid, that, from and after the 10th day of October, 1790, the ſaid recited duties, by the ſaid ſeveral Acts impoſed, for or in reſpect of the licences therein mentioned, ſhall ceaſe and determine.

Provided always nevertheleſs, that nothing herein-before contained ſhall extend to any arrears of the ſaid reſpectively recited duties which may remain unpaid, or to any fine, penalty, or forfeiture relating thereto reſpectively, which ſhall have been before incurred.

And be it further enacted, that from and after the ſaid 10th day of October, 1790, all licences which before ſhall have been granted by the ſaid Commiſſioners of Stamps, to any perſon whatſoever, to ſell wine by retail, or to ſell by retail Britiſh-made wines or ſweets, and which ſhall be then unexpired; and alſo all licences which, before the ſaid 10th day of October, 1790, ſhall have been granted by the ſaid Commiſſioners of Exciſe, or by the Collectors and Superviſors of Exciſe, or by their appointment, to any perſon whatſoever, to retail diſtilled ſpirituous liquors, and which ſhall be then unexpired, ſhall, on the ſaid 10th day of October, 1790, become and be null and void, to all intents and purpoſes whatſoever; any thing in the ſaid licences expreſſed, or in any Acts of Parliament contained to the contrary thereof in any wiſe notwithſtanding.

And be it further enacted, that every perſon whoſe licence for retailing of wine, ſweets, or ſpirituous liquors, ſhall become null and void by virtue of this Act, ſhall, on his, her, or their taking out a licence of the ſame kind as the licence ſo become null and void for the year ending on the 10th day of October, 1790, under and by virtue of this

this Act, be allowed to deduct, out of the money by this Act directed to be paid for ſuch laſt-mentioned licence, a rateable proportion according to the ſum of money by him paid for ſuch licence ſo become void, and the portion of time for which ſuch licence was granted to be in force which ſhall be unexpired at the time of ſuch licence ſo becoming null and void.

And be it further enacted by the authority aforeſaid, that, from and after the ſaid 10th day of October, 1790, all and every perſon, before he ſhall retail any foreign wine, or any Britiſh-made wines or ſweets, or any diſtilled ſpirituous liquors or ſtrong waters, ſhall take out ſuch licence herein-after mentioned, as the caſe may require, authorizing ſuch perſon to retail foreign wine, ſweets, or diſtilled ſpirituous liquors, as the caſe may require; which licences reſpectively ſhall be granted in manner herein-after mentioned; that is to ſay, if any ſuch licence ſhall be taken out within the limits of the chief office of Exciſe in London, the ſame ſhall be granted under the hands and ſeals of two or more of the Commiſſioners of Exciſe in England for the time being, or of ſuch perſons as they the ſaid Commiſſioners of Exciſe, or the major part of them for the time being, ſhall from time to time appoint for that purpoſe; but if any ſuch licence ſhall be taken out in any part of the kingdom of England not within the ſaid limits, the ſame ſhall be granted under the reſpective hands and ſeals of the ſeveral Collectors and Superviſors of Exciſe within their reſpective collections and diſtricts; and in caſe any ſuch licence ſhall be taken out within the limits of the City of Edinburgh, the ſame ſhall be granted under the hands and ſeals of two or more of the Commiſſioners of Exciſe in Scotland for the time being; or if any ſuch licence ſhall be taken out in that part of Great Britain called Scotland, out of the ſaid limits of the City of Edinburgh, then the ſame ſhall be granted under the reſpective hands and ſeals of the ſeveral Collectors and Superviſors of Exciſe in Scotland, within their reſpective collections and diſtricts; and the ſaid Commiſſioners of Exciſe in England and Scotland reſpectively, or any two or more of them reſpectively, and the perſons to be appointed by the ſaid Commiſſioners of Exciſe in England, or the major part of them, and alſo all ſuch Collectors and Superviſors are hereby reſpectively authorized and required to grant ſuch licences to the perſons who ſhall apply for the ſame, on the perſon or perſons applying for the ſame firſt paying for ſuch licences the ſeveral ſums of money following; that is to ſay,

For

For every licence which ſhall be granted to authorize any perſon to retail foreign wine in England, and who ſhall not have an exciſe licence for retailing diſtilled ſpirituous liquors or ſtrong waters, or a licence for retailing of beer, ale, or other exciſeable liquors, the ſum of 5*l.* 4*s.*

For every licence which ſhall be granted to authorize any perſon to retail foreign wine in England, and who ſhall take out a licence for retailing beer, ale, and other exciſeable liquors, but ſhall not have an exciſe licence for retailing of diſtilled ſpirituous liquors or ſtrong waters, the ſum of 4*l.* 4*s.*

For every licence which ſhall be granted to authorize any perſon or perſons to retail foreign wine in England, and who ſhall alſo have an exciſe licence for retailing diſtilled ſpirituous liquors or ſtrong waters, the ſum of 2*l.* 4*s.*

For every licence which ſhall be granted to authorize any perſon or perſons to retail Britiſh-made wines or ſweets, either in England or Scotland, the ſum of 2*l.* 4*s.*

For every licence which ſhall be granted to authorize any perſon or perſons to retail foreign wine in Scotland, and who ſhall not have an exciſe licence for retailing diſtilled ſpirituous liquors or ſtrong waters, or a licence for retailing of beer, ale, or other exciſeable liquors, the ſum of 3*l.* 6*s.* 8*d.*

For every licence which ſhall be granted to authorize any perſon or perſons to retail foreign wine in Scotland, and who ſhall take out a licence for retailing beer, ale, or other exciſeable liquors, but ſhall not have an exciſe licence for retailing diſtilled ſpirituous liquors or ſtrong waters, the ſum of 2*l.* 13*s.* 4*d.*

For every licence which ſhall be granted to authorize any perſon or perſons to retail foreign wine in Scotland, and who ſhall alſo have an exciſe licence for retailing diſtilled ſpirituous liquors or ſtrong waters, the ſum of 1*l.* 6*s.* 8*d.*

And for every licence which ſhall be granted to authorize any perſon or perſons to retail diſtilled ſpirituous liquors or ſtrong waters in any part of Great Britain, the ſum of 4*l.* 14*s.* if the dwelling houſe in which ſuch perſon ſhall reſide, or retail ſuch diſtilled ſpirituous liquors or ſtrong waters, at the time of taking out ſuch licence, ſhall not, together with the offices, courts, yards, and gardens therewith occupied, be rated, under the authority of an Act made in the 19th year of the reign of his preſent Majeſty, "for impoſing Duties on inhabited Houſes," at a rent of 15*l.* *per Annum*, or upwards.

If ſuch dwelling houſe ſhall, together with the offices, &c. therewith occupied, be rated as aforeſaid at 15*l.* *per annum*, or

or upwards, and under 20*l.* then ſuch perſon ſhall take out a licence as aforeſaid, and pay for the ſame the ſum of 5*l.* 2*s.*

If ſuch dwelling-houſe ſhall, together with the offices, &c. therewith occupied, be rated as aforeſaid at 20*l. per annum*, or upwards, and under 25*l.* then ſuch perſon ſhall take out a licence as aforeſaid, and pay for the ſame the ſum of 5*l.* 10*s.*

If ſuch dwelling-houſe ſhall, together with the offices, &c. therewith occupied, be rated as aforeſaid at 25*l. per annum*, or upwards, and under 30*l.* then ſuch perſon ſhall take out a licence as aforeſaid, and pay for the ſame the ſum of 5*l.* 18*s.*

If ſuch dwelling-houſe ſhall, together with the offices, &c. therewith occupied, be rated as aforeſaid at 30*l. per annum*, or upwards, and under 40*l.* then ſuch perſon ſhall take out a licence as aforeſaid, and pay for the ſame the ſum of 6*l.* 6*s.*

If ſuch dwelling houſe ſhall, together with the offices, &c. therewith occupied, be rated as aforeſaid at 40*l. per annum*, or upwards, and under 50*l.* then ſuch perſon ſhall take out a licence as aforeſaid, and pay for the ſame the ſum of 6*l.* 14*s.*

And if ſuch dwelling-houſe ſhall, together with the offices, &c. therewith occupied, be rated as aforeſaid at 50*l. per annum*, or upwards, then ſuch perſon ſhall take out a licence as aforeſaid, and pay for the ſame the ſum of 7*l.* 2*s.*

And be it further enacted, that the ſaid ſeveral ſums of money by this Act directed to be paid for ſuch licences reſpectively, ſhall be paid as hereinafter; that is to ſay, ſuch thereof as ſhall be taken out within the limits of the chief Office of Exciſe in London, ſhall be paid at the chief Office of Exciſe in London; and ſuch thereof as ſhall be taken out within the limits of the City of Edinburgh, ſhall be paid at the chief Office of Exciſe in Edinburgh; and ſuch thereof as ſhall be taken out in any part of Great Britain, not within the ſaid reſpective limits, ſhall be paid to the reſpective Collectors of Exciſe granting ſuch reſpective licences.

And be it further enacted, that all licences to be granted under and by virtue of this Act, ſhall remain and continue in force until and upon the 10th day of October next enſuing the time of the granting thereof, and no longer; provided always nevertheleſs, that where any licence ſhall be firſt granted between the 5th day of April and the 10th day of October in any year, there ſhall be charged only a rateable proportion of the money herein-before directed to be paid for or in reſpect of ſuch licence, according to the time for which ſuch licence ſhall be granted.

And

And be it further enacted, that no perſon ſhall retail any foreign wine, or any Britiſh-made wines or ſweets, or any diſtilled ſpirituous liquors or ſtrong waters, after the expiration of ſuch his, her, or their licence, unleſs ſuch perſon or perſons ſhall take out a freſh licence for the like purpoſe, in the manner herein-before directed, 10 days at leaſt before the expiration of ſuch former licence, and ſo in like manner renew every ſuch licence from year to year; and if any perſon or perſons ſhall retail any foreign wine, or any Britiſh-made wines or ſweets, or any diſtilled ſpirituous liquors or ſtrong waters, without firſt taking out a licence authoriſing him, her, or them ſo to do, and renewing the ſame as is herein-before in that behalf directed, he, ſhe, or they ſhall, for every ſuch offence, forfeit the ſum of 50*l.*

And be it further enacted by the authority aforeſaid, that upon the death of any perſon ſo licenſed, or upon the removal of any perſon or perſons ſo licenſed from the entered houſe or premiſes in which ſuch his, her, or their licence ſhall authorize him, her, or them to retail foreign-wine, or to retail Britiſh-made wines or ſweets, or to retail diſtilled ſpirituous liquors or ſtrong waters, it ſhall and may be lawful to and for the Commiſſioners of Exciſe in England and Scotland reſpectively for the time being, or any one or more of them, and to and for the ſeveral Collectors and Surveyors of Exciſe in England and Scotland reſpectively, within their reſpective collections and diſtricts, to authoriſe and impower the executors or adminiſtrators, or the wife or child of ſuch deceaſed perſon, or the aſſignee or aſſigns of any ſuch perſon ſo removing, who ſhall be poſſeſſed of ſuch houſe or premiſes, in like manner to retail foreign wine, or to retail Britiſh-made wine, or to retail diſtilled ſpirituous liquors, as the caſe may require, in the ſame entered houſe or premiſes where ſuch perſon, by virtue of ſuch licence, carried on ſuch trade, during the reſidue of the term for which ſuch licence was originally granted, without taking out a new licence during the reſidue of the ſaid term: provided always, that perſons trading in partnerſhip, and in one houſe or ſhop only, ſhall not be obliged to take out more than one licence in any one year, either for retailing foreign wine, or for retailing Britiſh-made wines, or for retailing diſtilled ſpirituous liquors, as the caſe may be; and that no one licence, which ſhall be granted by virtue of this Act, ſhall authorize any perſon to retail foreign wine, or to retail Britiſh-made wines, or to retail diſtilled ſpirituous liquors in any other houſe, or place, than that in which he ſhall re-

retail foreign wine, or retail Britiſh-made wines, or diſtilled ſpirituous liquors, as the caſe may require, at the time of granting ſuch licence, and whereof entry in writing ſhall be made at the Office of Exciſe in the name of ſuch perſon at the time of granting ſuch licence.

Provided always, that nothing herein contained ſhall in any wiſe be prejudicial to the privileges of the two Univerſities.

Provided alſo, that nothing herein-before contained ſhall be prejudicial to the commonalty of the Vintners of the City of London, or to any other city or town corporate, but that they may uſe and enjoy ſuch liberties and privileges as they have heretofore lawfully uſed and enjoyed: provided alſo, that no perſon who ſhall be admitted to the freedom of the ſaid Company of Vintners of the City of London by redemption only, ſhall be exempted from the obligation of taking out a licence for retailing foreign wine, but that the freemen only of the ſaid company, who ſhall have been already admitted to their freedom, or who ſhall be admitted to their freedom in right of patrimony or apprenticeſhip, ſhall be intitled to ſuch exemption.

Provided alſo, that nothing herein-before contained ſhall debar the Mayor or Burgeſſes of the Borough of St. Alban's in the County of Hereford, or their ſucceſſors, from enjoying all ſuch liberties to them heretofore granted by ſeveral letters patent, by Queen Elizabeth and King James I. for licenſing of three ſeveral wine taverns within the borough aforeſaid, for and towards the maintenance of the free-ſchool there.

Provided always nevertheleſs, that no licence to retail foreign wine, or to retail Britiſh-made wines or ſweets, or to retail diſtilled ſpirituous liquors, ſhall be granted to any perſon or perſons whatſoever, ſave and except to ſuch perſons only to whom a licence to retail foreign wine, or to retail Britiſh-made wines, or to retail diſtilled ſpirituous liquors reſpectively, might lawfully be granted by the ſeveral Acts of Parliament in force immediately before the paſſing of this Act.

And be it further enacted, that all and every perſon who ſhall ſell, or expoſe to ſale, any foreign wine, in any leſs quantity than ſhall be equal to the meaſure or quantity in which the ſame ſhall have been or may be lawfully imported by way of merchandize, ſhall be deemed and taken to be a retailer or retailers of foreign wine within the meaning of this Act; and if any foreign wine ſhall at any time be ſold.

or expoſed to ſale, by any perſon whatſoever, in any quantity leſs than the meaſure in which the ſame ſhall have been or might have been lawfully imported by way of merchandize, ſuch ſelling, or expoſing to ſale, ſhall be deemed to be a retailing of foreign wine, within the meaning of this Act; and every perſon who ſhall ſell, or expoſe to ſale, any Britiſh-made wine, in the quantity of twenty-five gallons, or under, ſhall be deemed and taken to be a retailer of Britiſh-made wines or ſweets, within the meaning of this Act; and if any Britiſh-made wine ſhall at any time be ſold, or expoſed to ſale, by any perſon whatſoever in any quantity leſs than twenty-five gallons, ſuch ſelling, offering, or expoſing to ſale, ſhall be deemed and taken to be a retailing of Britiſh-made wines within the meaning of this Act; and all and every perſon who ſhall ſell, expoſe to ſale, any brandy, rum, arrack, uſquebaugh, geneva, aquavitæ, or any other diſtilled ſpirituous liquors or ſtrong waters, unmixed or mixed with themſelves or any other ingredients, in any leſs quantity than two gallons, ſhall be deemed and taken to be a retailer of diſtilled ſpirituous liquors and ſtrong waters within the meaning of this Act; and if any diſtilled ſpirituous liquors or ſtrong waters, unmixed or mixed with themſelves, or any other ingredients, ſhall at any time be ſold, offered, or expoſed to ſale, by any perſon or perſons whatſoever in any quantity leſs than two gallons, ſuch ſelling, offering, or expoſing to ſale, ſhall be deemed and taken to be a retailing of diſtilled ſpirituous liquors and ſtrong waters within the meaning of this Act.

And be it further enacted, that all fines, penalties and forfeitures impoſed by this Act ſhall be ſued for, recovered, or mitigated, by ſuch methods as any fine, penalty, or forfeiture may be ſued for, or mitigated, by any law or laws of exciſe, or by action or debt, bill, plaint, or information, in any of his Majeſty's Courts of Record at Weſtminſter, or in the Court of Exchequer in Scotland, reſpectively; and that one moiety of every ſuch fine, penalty, or forfeiture, ſhall be to his Majeſty, his heirs, and ſucceſſors, and the other moiety to him or them who ſhall inform, diſcover, or ſue for the ſame.

And be it further enacted by the authority aforeſaid, that, from and after the ſaid 10th day of October, 1790, the ſaid ſeveral Acts made in the 9th year of the reign of her ſaid late Majeſty Queen *Anne*, in the 30th and 31ſt years of the reign of his ſaid late Majeſty King *George* II. and in the 26th year of the reign of his preſent Majeſty, ſo far as the ſame give any power or authority to the ſaid Commiſſioners

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of Stamps, or any of them, to grant licences to ſell wine by retail, or to ſell by retail Britiſh-made wines or ſweets; and alſo that the ſaid ſeveral Acts, made in the 16th and 24th years of the reign of his ſaid late Majeſty King *George* II. and in the 27th year of the reign of his ſaid preſent Majeſty, ſo far as the ſame gave any power or authority to the Commiſſioners of Exciſe in England and Scotland reſpectively, or any of them, or to the Collectors and Surviſors of Exciſe in England and Scotland reſpectively, to grant licences to retail diſtilled ſpirituous liquors or ſtrong waters, ſhall be, and the ſame are hereby repealed.

And be it further enacted by the authority aforeſaid, that all the powers, rules, exceptions, matters, and things, which in or by any Act or Acts of Parliament relating to the retailing of foreign wine, or Britiſh-made wines or ſweets, or diſtilled ſpirituous liquors, or to licences to retail the ſame reſpectively, in force immediately before the paſſing of this Act, are contained, provided, ſettled, or eſtabliſhed, for raiſing, levying, collecting, paying, recovering, adjudging, mitigating, aſcertaining, enforcing, or ſecuring the rates or duties by law impoſed for or in reſpect of ſuch licences, and for preventing, detecting, and puniſhing frauds relating thereto, or for the regulating of the ſaid liquors reſpectively, and not being expreſsly repealed, or controuled by this Act, or not being repugnant to any of the matters in this Act contained, ſhall be and continue in full force, and be duly obſerved, and put in execution throughout Great Britain, in and for the managing, raiſing, collecting, recovering, mitigating, ſecuring, the ſaid ſeveral duties by this Act impoſed, and for preventing, detecting and puniſhing frauds relating thereto, and for regulating the retailing of the ſaid liquors reſpectively, ſo far as the ſame are applicable thereunto reſpectively, as fully and effectually, to all intents and purpoſes, as if all and every the ſaid powers, proviſions, matters, and things, had been expreſsly inſerted and re-enacted in this Act.

And be it further enacted by the authority aforeſaid, that all and every the powers, directions, rules, penalties, forfeitures, clauſes, matters, and things, which in and by an Act made in the 12th year of the reign of King *Charles* II. cap. 24, or by any other law now in force relating to the revenue of Exciſe, are provided and eſtabliſhed, for managing, raiſing, or recovering the duties thereby granted, or any of them (other than in ſuch caſes for which other penalties or proviſions are made and preſcribed by this Act,)

ſhall be put in execution as fully and effectually, to all intents and purpoſes, as if all and every the ſaid powers, matters, and things, were particularly repeated and re-enacted in this preſent Act.

An Act for converting certain Annuities, to be attended with the Benefit of Survivorſhip in Claſſes, eſtabliſhed by an Act of the laſt Seſſion of Parliament, into certain Annuities for an abſolute Term of Years; and for enabling the Commiſſioners of the Treaſury to nominate Lives for the Shares ſo converted.

Whereas, in purſuance of an Act made and paſſed in the laſt Seſſion of Parliament, (intituled, "An Act for raiſing a certain Sum of Money by Way of Annuities, to be attended with the Benefit of Survivorſhip in Claſſes"), ſeveral perſons who had become contributors towards raiſing the ſum of 1 million 2,500*l.* have actually advanced and paid to the Caſhiers of the Bank of England the full ſums contributed: and whereas the ſeveral contributors, for every 100*l.* 5*s.* advanced, are at liberty to name the life of ſome one perſon, on or before the 10th day of October, 1790, and by virtue thereof will become intitled from the ſaid 10th day of October, 1790, for and during the life of the nominee who ſhall be appointed, to an annuity, to be attended with the benefit of ſurvivorſhip in claſſes, in manner in the ſaid Act mentioned: and whereas the ſeveral contributors, or ſome of them, are or may be willing and deſirous to have ſuch reſpective intereſts converted into certain annuities for an abſolute term of years herein-after mentioned; be it enacted, that all and every perſon or perſons who may be entitled to any life-annuity or annuities, with benefit of ſurvivorſhip as in the ſaid Act is granted, and who ſhall be poſſeſſed of any certificate, made out by the Caſhier of the Bank of England, in purſuance of the ſaid Act, may, on or before the 20th day of September, 1790, carry the ſaid certificate to the Auditor of the Exchequer, to be exchanged for other certificates to be made out by the ſaid Auditor, in the manner herein-after mentioned; and ſhall and may, by writing on the back of every ſuch certificate, elect to have his intereſt in any ſuch life-annuity with benefit of ſurvi-

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worſhip, converted into annuities for ſuch certain and abſolute term or terms of years as herein is mentioned; and the ſaid Auditor is hereby required, on the receipt of ſuch certificate, after correcting the intereſt thereon to the 10th day of October, 1799, to give a receipt for the ſame, expreſſing the particulars of ſum or ſums contained in ſuch certificate or certificates, and the ſaid intereſt, and cauſe the ſaid certificate to be filed in his office; and the ſaid Auditor ſhall, in lieu thereof, cauſe to be made out a diſtinct certificate in reſpect of every entire ſum of 100*l.* 5*s.* to the Bank of England, for the amount of the principal ſums contained in the certificates for which no fee ſhall be taken, nor ſtamp paid; and the perſon or perſons who ſhall be poſſeſſed of any ſuch laſt-mentioned certificate ſhall, upon delivery thereof to the ſaid Bank, be intitled to an annuity, at and after the rate of 4 5*s.* per *annum*, for and upon every entire ſum of 100*l.* which ſhall be expreſſed in ſuch laſt mentioned certificate, to commence from the 10th day of October, 1799, and to continue for a certain term of 60 years and one quarter of a year, and then to ceaſe; which ſhall be paid half-yearly, (that is to ſay), on the 5th day of April and the 10th day of October in every year during the ſaid term, the firſt payment thereon to be due for half a year on the 5th day of April, 1801, and ſo ſhall continue; and in every inſtance, the right and benefit which might ariſe to ſuch contributor, or his aſſigns, by virtue of the ſaid Act, to any annuity, with benefit of ſurvivorſhip, ſhall ceaſe, determine, and ſhall be deemed to be merged and extinguiſhed in the ſaid certain and abſolute term of years by this Act granted.

And be it further enacted, that in the office of the Accountant General of the Bank of England, a book ſhall be kept, in which the names of every perſon who ſhall have delivered certificates to be made out by the ſaid Auditor in purſuance of this Act, and the principal ſums contained therein, ſhall be fairly entered, which book or books the ſaid perſons, their ſucceſſors, and aſſigns reſpectively, and all perſons who ſhall continue to have an intereſt in ſuch life-annuity, with benefit of ſurvivorſhip as aforeſaid, ſhall from time to time, reſort to and inſpect, without any fee or charge.

And be it further enacted, that the perſons to whoſe credit ſuch principal ſums ſhall be ſo placed, their ſucceſſors, and aſſigns, ſhall and may have power to aſſign and transfer *the ſame*, or any part thereof, to any perſons whatever, in *the books* of the Bank of England, and ſuch ſums ſhall

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carry an annuity after the rate of 4*l.* 5*s.* *per ann.* in reſpect of every ſum of 100*l.* 5*s.* for the certain term of 69 years and one quarter of a year, and then to ceaſe, and ſhall be taken and deemed to be ſtock transferable, according to the true intent and meaning of this Act.

And be it further enacted, that all annuities for the term of 69 years and one quarter of a year, by this Act granted, ſhall be paid, and be transferable at the Bank of England, and that ſuch perſons, their ſucceſſors, and aſſigns, converting any life-annuities, with benefit of ſurvivorſhip, into annuities for the ſaid term of years, ſhall have good and ſure intereſts and eſtates therein, according to the ſeveral proviſions in this Act contained; and that the ſaid ſeveral annuities ſhall be free from all taxes, charges, and impoſitions whatſoever.

Provided always, that the ſeveral contributors who ſhall have had the intereſt, to become due on the ſaid 10th day of October, 1790, computed by the Caſhier of the Bank of England, purſuant to the Act of the laſt Seſſion, be intitled to receive at the Exchequer, ſuch intereſt after the rate in the ſaid Act mentioned.

And be it further enacted, that all perſons who ſhall be entitled to any of the annuities hereby granted, ſhall be poſſeſſed thereof, as of a perſonal eſtate, which ſhall not be deſcendible to heirs, nor liable to any foreign attachment by the cuſtom of London, or otherwiſe; any law, ſtatute, or cuſtom to the contrary notwithſtanding.

And be it further enacted, that books ſhall be kept, wherein all aſſeſſments or transfers, in reſpect of the ſaid annuities, ſhall be entered and regiſtered; which entry ſhall be ſigned by the parties making ſuch transfers, or by their reſpective attornies, thereunto authorized, in writing under their hand and ſeal, to be atteſted by two or more credible witneſſes, and that no other method of aſſigning and transferring the ſaid annuities, ſhall be good or available in law.

Provided always, that all perſons poſſeſſed of any ſhare or intereſt in the ſaid ſtock of annuities, or any eſtate or intereſt therein, may bequeath the ſame by will in writing, atteſted by two or more credible witneſſes, but that no payment ſhall be made upon any ſuch bequeſt until ſo much of the ſaid will as relates to ſuch ſhare, be entered in the ſaid office; and that in default of ſuch transfer or deviſe of ſuch ſhare, eſtate, or intereſt in the ſaid ſtock of annuities, ſhall go to the executors, adminiſtrators, ſucceſſors, and aſſigns; and that no ſtamp-duties whatever ſhall be charged on any

of the ſaid transfers; any law or ſtatute to the contrary notwithſtanding.

And be it further enacted, that the ſaid Auditor of the Exchequer ſhall, immediately after the 20th day of September, 1790, certify to the Commiſſioners of his majeſty's Treaſury the number of certificates which ſhall be filed as aforeſaid in the Office of the ſaid Auditor; and alſo the number of ſuch ſhares of and in the life-annuities, with benefit of ſurvivorſhip, which ſhall have been converted into annuities for ſuch terms of years as aforeſaid depending thereon; and the ſaid Commiſſioners of the Treaſury ſhall and may, for and in reſpect of each and every ſuch ſum of 100*l.* 5*s.* contained in ſuch certificates, be at liberty to name, in the manner herein directed, the life of ſome one perſon, at any time or times on or before the 10th of October, 1790, in the manner hereinafter directed; during which life and lives there ſhall be reſerved at the ſaid receipt of Exchequer, to the uſe of the publick, at the reſpective days of payment in the ſaid Act mentioned, ſuch and the like annuity and annuities reſpectively, with the like benefit of ſurvivorſhip in claſſes, as any contributor or contributors in the ſame claſſes reſpectively would be intitled unto by the ſaid Act in reſpect of an equal number of ſhares thereof, and which annuity or annuities ſo reſerved at the ſaid receipt to the uſe of the publick, ſhall from time to time, as they reſpectively grow due and ariſe, be carried to and made part of the conſolidated fund towards ſatisfying and replacing the annuities at and after the rate of 4*l.* 5*s.* granted under this Act, and charged thereon as aforeſaid.

And be it further enacted, that the ſaid Commiſſioners of His Majeſty's Treaſury ſhall, out of the ſeveral degrees of perſons hereinafter mentioned, ſelect ſo many nominees as ſhall be neceſſary to carry into execution this preſent Act; (that is to ſay) Peers of Great Britain, or of Ireland, or the children or grand-children of ſuch Peers reſpectively; or Baronets of England or Scotland, or Lords of Manors in England or Wales, or perſons named in the Commiſſion of the Peace for any County in England or Wales, or their children; or who are or ſhall be ſpiritual perſons, promoted to any Biſhoprick, Deanry, Archdeaconry, Prebend, or other Dignity in any Cathedral, or other Church, or beneficed with any Parſonage, vicarage, or donative in England, or a Fellowſhip in any College or Hall of either of the Univerſities of Oxford or Cambridge; or are or ſhall be for the time being Governors of the Charter-Houſe, the Foundling-Hoſpital, or Chriſt's Hoſpital; or ſuch perſons

who are duly regiſtered in the Books of the Amicable Society for Inſurance on Lives in Serjeant's Inn, and whoſe names, places of abode, and ages reſpectively, ſhall be fully ſet forth in ſuch regiſter; and all and every ſuch perſon and perſons reſpectively, who ſhall be appointed nominees by the ſaid Commiſſioners of the Treaſury, at any time or times on or before the 10th day of October, 1790, out of the orders, degrees, or ſocieties of perſons abovementioned, ſhall be deemed and adjudged to be nominees, during whoſe lives reſpectively there ſhall be reſerved, for the uſe of the publick, annuities to be attended with benefit of ſurvivorſhip, at and after the reſpective rates, and at the times in the ſaid Act mentioned, as fully and effectually as if ſuch nominees had been appointed under and by virtue of the ſaid former Act.

Provided always, that the ſaid Commiſſioners of the treaſury ſhall deliver to the ſaid Auditor a true copy of the regiſter of the birth or baptiſm of every ſuch nominee, and alſo a certificate of the ſame, under the hands of the Miniſter of the pariſh or place where ſuch regiſter ſhall be kept, or of the Churchwardens or Overſeers, or other principal inhabitants, of ſuch pariſh or place, or any two of them, thereby certifying the ſame to be a true copy of ſuch regiſter; and alſo a certificate under the hands of the Miniſter of the pariſh or place where ſuch nominee ſhall reſide, or of the Churchwardens or Overſeers, or other principal inhabitants of ſuch pariſh or place, or any three or more of them, thereby certifying the name, ſurname, and place of abode, of ſuch nominee; and in caſe any ſuch nominee ſhall be regiſtered in the books of the ſaid Amicable Society, then the ſaid Commiſſioners of the Treaſury ſhall alſo deliver to the ſaid Auditor a certificate, under the hands of two or more of the Directors, certifying the name, place of abode, and age, of every ſuch nominee, together with ſuch other apt deſcriptions to aſcertain the perſon of every ſuch nominee as may appear in the books of the ſaid Society or Company; and which copies and certificates aforeſaid the reſpective Miniſters, Officers, Directors, or Governors, or other perſons aforeſaid, are hereby reſpectively required and enjoined, upon application in writing, to deliver to the ſaid Commiſſioners of the Treaſury, or to the perſon or perſons to be appointed by them, at ſuch times reſpectively as the ſaid Commiſſioners of the Treaſury, or any three of them, ſhall direct; and any appointment in writing, under the hands and ſeals of the ſaid Commiſſioners of the Treaſury, of nominees by virtue of this Act, ſhall be a ſuffi-

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warrant to the proper officers for admitting every ſuch on to be a nominee in the proper claſs, according to the ctions of the ſaid Act.

nd be it further enacted by the authority aforeſaid, the ſaid Commiſſioners of the Treaſury for the time g ſhall, half-yearly, during the continuance of any life ives ſo nominated and appointed as aforeſaid, tranſmit he ſeveral pariſhes and places in Great Britain, where ſuch nominees ſhall reſide, a liſt of all the nominees apted under this Act reſiding in ſuch pariſh or place; and to the Directors of the ſaid Society a liſt of all ſuch nocees regiſtered in the ſaid Society; and the reſpective niſters, Officers, or other perſons aforeſaid, of the reive places to which ſuch liſts ſhall be tranſmitted, and Directors or Governors of the ſaid Society reſpectively, half-yearly (that is to ſay) before the 5th day of April, the 10th day of October, in each year, on ſuch days times reſpectively as the ſaid Commiſſioners of the Treaſ ſhall direct, return to the ſaid Commiſſioners a certite, under the hands of ſuch Miniſters, Officers, or other ſons, or of any two of them, or under the hands of Directors, or any two of them reſpectively, thereby ifying the lives of all and every nominees appointed the ſaid Commiſſioners of the Treaſury which ſhall then liſt; and alſo the deaths of ſuch nominees which ſhall e come to their knowledge reſpectively, or of the reval of ſuch nominees, or any of them, from ſuch pariſh place, as the caſe may require: and the certificates cerying the lives of the ſaid nominees, being filed at the Ofe of the Auditor of the ſaid Exchequer, ſhall be a ſufficient rrant for ſetting apart and reſerving at the ſaid receipt, the uſe of the publick, the half-yearly payments which ill ariſe or grow due, or ſhall have ariſen and grown due, reſpect of the ſaid nominees ſo certified, according to the ie intent and meaning of this Act, and which certificates ill not be chargeable with any ſtamp-duty.

Provided always, and be it further enacted by the aurity aforeſaid, that if, at the time when any half-yearly yment ſhall become due, to any ſuch nominee or nomiees in his Majeſty's land forces, or navy, it ſhall be lawful produce to the ſaid Auditor, for the purpoſes aforeſaid, certificate of the lives or deaths of ſuch nominees, under e hands of the reſpective officers commanding the regients or corps, where ſuch nominees ſhall ſerve or have ved, or under the hands of two or more of the Commiſiners of the Admiralty or Navy for the time being, as the

caſe may require; and in caſe any ſuch nominee or nominees ſhall be reſident at either of the ſaid Univerſities, or at any ſchool, then, and in ſuch caſe, it ſhall be lawful to produce the like certificate, under the hand of the principal Rector, Warden, or maſter of the College, Hall, or School aforeſaid, in which ſuch nominees ſhall be reſpectively reſident; which certificates ſhall be likewiſe a ſufficient warrant for ſetting apart and reſerving the ſaid half-yearly payments.

And be it further enacted, that the ſaid Auditor of the Exchequer ſhall, immediately after the 20th day of September, 1790, certify to the Commiſſioners of the Treaſury, or the Lord-High-Treaſurer for the time being, the name and number of perſons which ſhall have been then appointed to be nominees, under the ſaid Act; and the ſaid Commiſſioners ſhall, in the appointment of nominees on the part of the publick, diſtribute the number of nominees among the ſeveral claſſes of the tontine, in the ſame proportion in which the number of nominees appointed by the ſeveral contributors, and the number of ſhares depending on the lives of ſuch nominees, ſhall appear to have been diſtributed among the ſaid claſſes reſpectively.

And be it further enacted by the authority aforeſaid, that the names of all perſons of any of the deſcriptions hereinbefore enumerated, whoſe reſpective ages and places of abode ſhall be aſcertained by the Commiſſioners of the Treaſury, at any time on or before the 20th day of September, 1790, ſhall be diſtributed into ſix claſſes, correſponding to the ſeveral claſſes directed by the ſaid Act of the laſt Seſſion of Parliament, and written or printed on diſtinct pieces of paper, being rolled up in the ſame manner; and ſhall be put into ſix boxes, according to the ſix ſeveral claſſes, in the preſence of the ſaid Commiſſioners of the Treaſury, and alſo the Deputy Governor of the Bank, be publickly drawn in their order, until a ſufficient number of names in each claſs ſhall be drawn out of the ſaid boxes, to fill up the proportion of nominees to be appointed on the part of the publick, according to the proviſions of this Act.

And be it further enacted, that no fee or gratuity ſhall be taken for paying the ſaid annities, or for any tranſfer, upon pain that any perſon offending, ſhall forfeit the ſum of 20*l.*

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